

IN THE CIRCUIT COURT OF OHIO COUNTY
WEST VIRGINIA

IN RE: TOBACCO LITIGATION :
:
: CIVIL ACTION NO.
(MEDICAL MONITORING CASES) : 00-C-6000

Deposition of JACK EDWARD HENNINGFIELD,
taken on Wednesday, August 23, 2000, at 9:01
a.m., at the law offices of Piper, Marbury,
Rudnick & Wolfe, 6225 Smith Avenue, Baltimore,
Maryland, before E. Duane Smith, Notary Public.

Reported by:
E. Duane Smith, RPR-CRR
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

2

APPEARANCES:

WILLIAM MICHAEL GRUENLOH, ESQUIRE
Ness, Motley, Loadholt, Richardson
& Poole, Attorneys at Law
28 Bridgeside Boulevard
P.O. Box 1792
Charleston, South Carolina 29465
(843) 216-9000
On behalf of the Plaintiffs

JEFFREY L. FURR, ESQUIRE
Womble Carlyle Sandridge & Rice
200 West Second Street
Post Office Drawer 84
Winston-Salem, North Carolina 27102
(336) 721-3532
On behalf of the Defendant
R.J. Reynolds Tobacco Company

J. WILLIAM NEWBOLD, ESQUIRE
MICHAEL B. MINTON, ESQUIRE
Thompson Coburn
One Firststar Plaza
St. Louis, Missouri 63101
(314) 552-7000
On behalf of the Defendant
Lorillard Tobacco Company

SAMUEL E. KLEIN, ESQUIRE
Dechert Price & Rhodes
4000 Bell Atlantic Tower
1717 Arch Street
Philadelphia, Pennsylvania 19103-2793

(215) 994-2875
20 On behalf of the Defendant
Brown & Williamson Tobacco
21 Corporation

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

3

1 APPEARANCES (Continued)

2

PETER A. WOOLSON, ESQUIRE
3 Robinson Woolson O'Connell, LLP
217 East Redwood Street, Suite 1500
4 Baltimore, Maryland 21202
(410) 625-0000
5 On behalf of the Defendant
Liggett Group, Inc, et al.

6

7 GRETCHEN M. CALLAS, ESQUIRE
Jackson & Kelly
8 1600 Laidley Tower
P.O. Box 553
9 Charleston, West Virginia 25322
On behalf of the Defendant
10 Brown & Williamson, et al.
(Via telephone)

11

12 KENNETH E. KNOPF, ESQUIRE
Pullin, Knopf, Fowler & Flanagan
13 1000 Bank One Center
707 Virginia Street East
14 Charleston, West Virginia 25301
On behalf of the Defendant
15 Liggett Group, et al.
(Via telephone)

16

17 P. MICHAEL PLESKA, ESQUIRE
Bowles Rice McDavid Graff & Love, LLC
18 600 Quarrier Street
P. O. Box 1386
19 Charleston, West Virginia 25325-1386
On behalf of the Defendant
20 R. J. Reynolds Tobacco Company
(Via telephone)

21

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

4

1 APPEARANCES (Continued)

2

SCOTT LONG, ESQUIRE
Hendrickson & Long
3 214 Capitol Street
P. O. Box 11070
4 Charleston, West Virginia 25339
On behalf of the Plaintiffs

5 (Via telephone)

6 GABRIELLE HILL, ESQUIRE
Densmore & Shohl, LLP
7 1900 Chemed Center
255 East Fifth Street
8 Cincinnati, Ohio 45202-3172
On behalf of the Defendant
9 Brown & Williamson Tobacco
Corporation, et al.
10 (Via telephone)

11 ROBERT HOGAN, ESQUIRE
12 Farrell, Farrell & Farrell, L.C.
The Farrell Building
13 914 Fifth Avenue
P.O. Box 6457
14 Huntington, West Virginia 25772-6457
On behalf of the Defendant
15 Lorillard Tobacco Company
(Via telephone.)

16
17
18
19
20
21 COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

5

1 P R O C E E D I N G S
2 Whereupon,--
3 MR. KNOPF: Ken Knopf of Pullin, Knopf,
4 Fowler & Flanagan, on behalf of Liggett Group.
5 MR. LONG: Scott Long on behalf of
6 plaintiffs, Hendrickson & Long.
7 MR. HOGAN: Robert Hogan, Farrell,
8 Farrell & Farrell, Lorillard.
9 MS. CALLAS: Gretchen Callas with
10 Jackson & Kelly for Brown & Williamson.
11 MS. HILL: Gabrielle Hill from Densmore
12 & Shohl on behalf of Brown & Williamson.
13 MR. FURR: My name is Jeff Furr. I'll
14 be taking the deposition on behalf of R.J.
15 Reynolds; and I want to begin by saying hello to
16 my old friend Scott Long, who I have not seen for
17 a long time.
18 MR. LONG: Who was that? I did hear my
19 name. Who is talking?
20 MR. FURR: This is Jeff Furr, and I
21 wanted to begin by saying hello to Scott.
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

6

1 MR. LONG: How are you?
2 MR. FURR: Fine.
3 MR. LONG: Look forward to seeing you.
4 MR. FURR: We'll see each other sooner
5 or later.
6 MS. MOORE: I'm Alecia Moore with Womble

7 Carlyle.
8 MR. NEWBOLD: Bill Newbold, Thompson
9 Coburn, for Lorillard.
10 MR. KLEIN: Sam Klein, Dechert, Philip
11 Morris.
12 MR. WOOLSON: Peter Woolson, Robinson
13 Woolson O'Connell on behalf of Liggett.
14 MR. MINTON: Mike Minton, also for
15 Lorillard.
16 MR. GRUENLOH: Mike Gruenloh with Ness
17 Motley on behalf of plaintiff.
18 MR. FURR: Can you swear the witness,
19 please?

20 STIPULATIONS
21 It is stipulated and agreed by and
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

7
1 between counsel for the respective parties that
2 the filing of this deposition with the Clerk of
3 Court is hereby waived.

4 -----
5 JACK EDWARD HENNINGFIELD,
6 being first duly sworn to tell the truth, the
7 whole truth, and nothing but the truth, testified
8 as follows:

9 EXAMINATION BY MR. FURR:
10 Q. Good morning, Dr. Henningfield.
11 A. Good morning.
12 Q. State your name for us, please?
13 A. Jack Edward Henningfield.
14 Q. Dr. Henningfield, you have been deposed
15 a number of times in cases related to smoking
16 and health; is that correct?
17 A. That's correct.
18 Q. Do you have a general understanding of
19 the manner in which depositions are conducted?
20 A. Yes, I do.
21 Q. If I ask you a question today that you
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

8
1 are not certain you understand, let me know and
2 I'll try to rephrase the question for you.
3 A. Okay.
4 Q. Do you have any constraints on your time
5 today?
6 A. No.
7 Q. Dr. Henningfield, I have reviewed your
8 prior transcripts, but I'm unclear as to how many
9 times you have actually testified at trial in
10 smoking and health cases. I am aware of your
11 testimony in the Washington Attorney General's
12 case and in the Marcie case in Oklahoma. My
13 question is: Have you testified at trial in any
14 smoking health cases other than those I have
15 mentioned?
16 A. No. I have not.
17 (Whereupon, Henningfield Deposition
18 Exhibit No. 1, notice, marked.)
19 Q. Dr. Henningfield, let me hand you what

20 is marked as Deposition Exhibit 1, ask you
21 whether you have seen that document before.

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

9

1 A. I don't believe that I have seen this
2 document.

3 Q. You will notice that attached to your
4 notice is a schedule of documents in which you
5 are requested to bring with you today certain
6 documents?

7 A. Yes.

8 Q. Have you seen the schedule of documents
9 prior to my handing it to you?

10 A. Yes. I have received it the afternoon
11 of the 21st.

12 Q. Have you brought documents with you
13 today that you believe to be responsive to the
14 requests contained in the schedule of documents?

15 A. Yes, I have.

16 Q. Let me ask you to -- we'll go through
17 these in order. Let me ask you to hand to me any
18 documents you have that are responsive to request
19 number one in the schedule of documents.

20 A. This first document is the only one that
21 I have extra copies. The other things I will

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

10

1 need a copy made today. We had a turnover in our
2 staff and I was unable to get things copied
3 yesterday. This is my curriculum vitae, and on
4 page --

5 Q. Let me stop you, just so that we are all
6 clear what we're talking about. My first
7 question to you is: With respect to request
8 number one in the schedule of documents, which is
9 a list of all the cases in which you have
10 testified as an expert at trial or by deposition?

11 A. Yes. And this is provided on page
12 eight, where it listed as an expert witness or
13 consultant on behalf of plaintiffs, and I realize
14 looking at this, that it didn't differentiate
15 which cases were trials, so I will circle those
16 two. Marcie was listed earlier.

17 MR. FURR: Mark this as Exhibit 2.

18 (Whereupon, Henningfield Deposition
19 Exhibit No. 2, CV, marked.)

20 Q. Dr. Henningfield, the request number
21 three on the schedule of documents is: Bring with

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

11

1 you any and all documents that you relied upon
2 and reviewed in forming your opinions that you
3 will render in the case.

4 Have you brought with you any documents
5 responsive to that request?

6 A. I have brought two documents, because
7 these are the only two documents that are new

8 documents that I have retrieved just specifically
9 for the purposes of today's deposition.

10 All of the other documents that I have
11 are documents that we discussed in various
12 depositions in the Washington trial and so forth.

13 But I will give you the two documents
14 that I reviewed specifically for this deposition.

15 These are two Centers for Disease
16 Control MMWR reports, and again I'm sorry, but
17 I'll have to see if we can get copies of those
18 made today, so I can bring them back with me.

19 MR. FURR: Mark these as 3 and 4,
20 please.

21 (Whereupon, Henningfield Deposition
COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

12

1 Exhibit No. 3, MMWR Weekly report, dated 11/6/98
2 marked.)

3 (Whereupon, Henningfield Deposition
4 Exhibit No. 4, MMWR weekly report dated 11/19/99,
5 marked.)

6 Q. Dr. Henningfield, we have marked as
7 Exhibit 3 an MMWR weekly report from November 6,
8 1998, titled State Specific Prevalence Among
9 Adults of Current Cigarette Smoking and Smokeless
10 Tobacco Use and Per Capita Tax-Paid Sales of
11 Cigarettes, United States 1977, correct?

12 A. Correct.

13 Q. That's one of the documents you brought
14 with you in response to request number three,
15 correct?

16 A. Correct.

17 Q. For what proposition do you rely upon
18 this document with respect to your opinions in
19 this case?

20 A. It provides a snapshot comparison of
21 smoking prevalence in states in the United

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

13

1 States, and these data come up to 1998 and it
2 allows me to put West Virginia in context with
3 other states.

4 Q. Could you elaborate upon what opinions
5 you are prepared to express in this case for
6 which you intend to put West Virginia in context
7 with respect to the other states?

8 A. The most important thing would have been
9 to determine if West Virginia were, for example,
10 an extraordinary outlier in the sense of showing
11 rapidly declining prevalence or very low
12 prevalence, which would have been interesting to
13 me, which would have possibly reflected efforts
14 to decrease smoking prevalence.

15 Q. But this document does not show that,
16 does it?

17 A. No. The document does not show that.

18 Q. What opinions do you hold that this
19 document either tends to support or alters, or
20 how will you rely upon this information in your

21 testimony?

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

14

1 A. That our general knowledge about tobacco
2 dependence, trends and dependence or addiction,
3 the more general word, apply to West Virginia,
4 and that, if anything, the directions that West
5 Virginia has been going in in recent years are
6 worse, from a public health perspective, than
7 most other states.

8 Q. That's because the smoking prevalence in
9 West Virginia is higher than the average state?

10 A. Yes. It is one of the highest.

11 Q. Do you have an opinion as to why that is
12 the case?

13 A. It would be complex. Part of it would
14 be the failure of efforts to prevent smoking in
15 young people and induce existing adult smokers to
16 quit smoking and to help them when those efforts
17 have not been very successful. And as to what
18 all accounts for that, that would be beyond a
19 simple statement. We could talk about that all
20 day, but we would need more data and more
21 information, but it certainly is a red flag over

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

15

1 the state that calls for review.

2 Q. This study deals with the then current
3 prevalence of smoking in West Virginia, correct?

4 A. Correct.

5 Q. This study does not contain information
6 with respect to smoking prevalence stratified by
7 age groups, does it?

8 A. I don't believe in that study it has
9 age. It has a gender breakdown, and I don't
10 believe that that study had age.

11 There are other reports with youth
12 smoking trends. I have looked at them sometime
13 in the past. I did not pull those reports
14 yesterday.

15 Q. I guess that was my point, this study
16 doesn't contain any information about youth
17 smoking trends, does it?

18 A. This one that you are looking at does
19 not. As I mentioned, youth smoking trends in
20 West Virginia, I believe, are also higher than
21 the national average, but I did not bring the

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

16

1 specific document that provides the numbers on
2 that.

3 Q. Do you have any information with respect
4 to whether or not the cigarette manufacturers
5 have marketed their products in West Virginia any
6 differently than they have marketed them
7 elsewhere? By that, I mean either whether the
8 advertising has been heavier or has utilized

9 different themes and whether marketing of
10 cigarettes in West Virginia has been any
11 different than in other states in the United
12 States?

13 A. I'm not aware of specific differences.

14 Q. In general, to what do you attribute
15 the, what you believe to be the decreased
16 quitting rates among smokers in West Virginia
17 compared to other states?

18 A. I'm not prepared to tell specifically
19 why. I can discuss the kinds of factors that we
20 know affect prevalence of quitting, and that I
21 would expect would apply to West Virginia. But

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

17

1 there are many factors, and so if I mention some,
2 it would be a mistake to assume that this is it.

3 Would you like me to mention some?

4 Q. Yes. I would, and I understand your
5 answer, but my question is: Let's begin generally
6 and maybe you can tell us what the factors are
7 that you believe to affect quitting rates that
8 you also believe or at least have no reason to
9 believe do not apply to West Virginia?

10 A. Sure. One important factor in
11 influencing quitting rates is a strong,
12 consistent message that smoking is harmful and an
13 understanding and belief of smokers that that is
14 true.

15 In other words, if they are getting in
16 the opposite case a mixed message, or if that
17 health message is strongly countered by tobacco
18 industry marketing, for example, that constitutes
19 a mixed message.

20 In the extreme case, events such as The
21 Great American Smokeout nationwide produce an

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

18

1 increase for at least a few days in quitting
2 rates, because of the strong message, so that is
3 an important factor.

4 Another factor is the accessibility of
5 treatment options. And by "accessibility" it is
6 not just is it possible to get treatment, but how
7 difficult is it to get treatment and how
8 expensive is it relative to your income.

9 I know from other readings that West
10 Virginia is a lower per capita income state than
11 many states, and that is consistent with an
12 interpretation that treatment would be relatively
13 speaking more expensive. It is also a state with
14 a diverse rural population, and, again, what we
15 know from our experience, smoking cessation
16 clinics, is that that means that there are
17 almost -- are extremely likely less convenient
18 opportunities for West Virginians to obtain help
19 in quitting smoking, if they so choose, so there
20 are a number of things like this that affect
21 trends in quitting.

1 Q. Any other general factors you want to
2 list that you would expect to be in play in West
3 Virginia in affecting the quitting rates?

4 A. Well, as I mentioned, marketing of
5 tobacco product sales is all always a factor that
6 is important. As to whether there are marketing
7 techniques that have been used in West Virginia
8 that are unique to that state, I'm not prepared
9 to state, because I'm not aware of any.

10 Q. Do you have any reason to believe that
11 the message that smoking is a dangerous and risky
12 behavior has been disseminated in West Virginia
13 any differently than it has been in other states?

14 A. Well, what I just mentioned about the
15 fact that it has a substantial rural population
16 and lower per capita income than some states,
17 means that whatever health message that is out
18 there is more easily overwhelmed by tobacco
19 industry advertising.

20 I haven't done an analysis to determine
21 the amount of money spent in West Virginia for

1 advertising versus the amount that is available
2 by the health authorities for disseminating their
3 message, but it would be consistent with that.

4 Q. Have you made any study whatsoever, of
5 the manner or frequency with which the message
6 that smoking is a dangerous and risky behavior
7 has been historically disseminated in West
8 Virginia?

9 A. No.

10 Q. Do you have any information with respect
11 to whether or not West Virginia citizens have any
12 different rate with respect to holding the belief
13 that smoking is a dangerous and risky behavior
14 than do citizens of other states?

15 A. Well, we have evidence that bears on
16 that. And it is the evidence where the rubber
17 hits the road, which is their smoking prevalence.
18 And drug addictions in general, an understanding
19 of harm and a strong, consistent understanding of
20 the harm and the damage is one factor that is
21 correlated with trends in drug abuse.

1 Q. I understand that you believe this to be
2 a factor, but really my question is: Is there any
3 empirical evidence, for example, have West
4 Virginia citizens been polled and has there been
5 a finding that a fewer percentage of West
6 Virginians hold the belief that smoking is a
7 risky and dangerous behavior than do citizens of
8 other states?

9 MR. GRUENLOH: Objection to form.

10 A. There is empirical evidence, and, again,
11 it is the most empirical evidence in one sense
12 and that is the smoking prevalence.

13 Q. Okay. As you know, there have been many
14 polls conducted over time, with respect to the
15 prevalence among the citizens of the United
16 States of certain beliefs about smoking and
17 health, correct?

18 A. Correct.

19 Q. Do you have any information with respect
20 to whether or not the citizens of West Virginia
21 hold the belief that smoking is a dangerous and

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

22

1 risky behavior to any lesser extent than citizens
2 of other states?

3 A. Again, I have the most important
4 information which is their smoking prevalence.
5 As to specific comparative polls of beliefs, I
6 haven't reviewed such data.

7 Q. When you listed accessibility of
8 treatment options as a factor that might
9 influence the quitting rates in West Virginia,
10 what treatment options were you referring to?

11 A. This would be behavioral and group kinds
12 of clinics, such as American Lung Association,
13 American Cancer Society, and other voluntary
14 organizations, which are most typically set up in
15 cities, and over-the-counter medicines like
16 nicotine gum and patch and the prescription
17 medicines.

18 Q. What percentage of people in the United
19 States that quit smoking utilize some form of
20 group therapy, such as those that you just
21 described, in their cessation efforts?

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

23

1 A. A small but increasing percentage. The
2 target is moving and I don't recall the exact
3 numbers.

4 The overall percentage has historically
5 been smaller because there wasn't frequent
6 availability. Now that there is increasing
7 treatment availability, the percentage is
8 increasing.

9 Q. Can you give us a ballpark?

10 A. Oh, it used to be, at one point, a
11 decade or so ago, it was probably less than one
12 or two percent. It is probably moving closer to
13 10 percent with some kind of treatment
14 assistance.

15 So the numbers are still low, but it is
16 frankly an extraordinary increase.

17 Q. What percentage of smokers in the United
18 States that quit smoking utilize some form of
19 nicotine supplementation or replacement therapy
20 in their cessation efforts?

21 A. I don't know the exact percentage.

COURT REPORTING CONCEPTS, INC.

1 Q. Can you give us a ballpark on that?

2 A. Probably more than one, less than 10
3 percent, but that is as small a ballpark as I
4 would be willing to speculate on.

5 Put it this way: Going beyond that would
6 be speculation at this time.

7 Q. We marked as your Deposition Exhibit 4
8 an article that you brought entitled State
9 Specific Prevalence of Current Cigarette and
10 Cigar Smoking Among Adults, United States, 1998,
11 correct?

12 A. Correct.

13 Q. That's another of the articles you
14 brought with you responsive to request number
15 three on the schedule of documents, correct?

16 A. Correct.

17 Q. Have you utilized the information
18 contained in this document in the same manner as
19 you utilized the information contained in
20 Exhibit 3?

21 A. Yes.

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

1 Q. Are there any differences with respect
2 to the way you have relied upon the information
3 contained in Exhibit 4 than we just discussed
4 about for Exhibit 3?

5 A. May I just for 30 seconds look at the
6 two documents?

7 Q. Sure.

8 A. Because there were similarities and
9 differences.

10 Let's see, over the last few minutes, we
11 have been discussing Exhibit 3, correct?

12 Q. Correct.

13 A. Exhibit 4 is similar, but the focus is
14 on cigar smoking. I don't recall that Exhibit 4
15 talks about smokeless tobacco, but Exhibit 4 also
16 is one year more recent. And the purpose was not
17 to do a thorough analysis of smoking in West
18 Virginia, but, again, to get the perspective from
19 the Centers of Disease Control as to what the
20 numbers looked like and what directions they were
21 moving in.

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

1 Q. Well, let me ask you that question: What
2 direction are the numbers moving in?

3 A. Well, there is a slight increase in
4 smoking prevalence from the 1997 to the 1998
5 data, I believe from about 27.3 or 4 percent to
6 27.8 or 9 percent. It is not a big change. It
7 is a small change in the wrong direction from a
8 public health perspective.

9 Q. Do you have any information with respect
10 to whether, and if so in what direction, the

11 smoking prevalence in West Virginia has changed
12 since 1998?

13 A. I don't have data that are more recent.
14 The reason I selected those years first, I did
15 not have in my file a more recent snapshot,
16 though it is possible that CDC does have the 1999
17 data, and I just didn't have it.

18 But those years were of interest to me,
19 since they were during the period that supposedly
20 the tobacco industry has been changing its ways
21 and it was interesting for me to see if there was

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

27

1 any change in smoking prevalence that reflected
2 the claims of the industry that they are changing
3 their ways.

4 Q. How has the prevalence of smoking in
5 West Virginia changed since the early 1950's?

6 A. In the early 1950's, the rates were much
7 higher. I don't know the exact percentage
8 offhand, but I believe that they were changed in
9 at least two general and important ways.

10 One is the relative proportion of women
11 smoking has increased relative to men.

12 And the second is that the overall
13 prevalence is lower than it was in the 1950's.

14 Q. Would you expect the overall prevalence
15 of smoking in West Virginia in the early 1950's
16 to have been about 50 percent of adults?

17 A. In that ballpark.

18 Q. And so in round numbers at least, the
19 current prevalence of smoking in West Virginia is
20 probably about 50 percent of what it was in the
21 early 1950's, correct?

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

28

1 A. Well, put another way, there was a
2 jagged, my recollection is, that West Virginia,
3 again, I have looked at records in the past, and
4 again what I am basing this on is that I
5 regularly review trends and one of the things
6 that I do when I review trends in the nation is
7 look at states to see if there are strong
8 outliers. In general the main way that West
9 Virginia has been an outlier is that it has
10 reflected national trends, but, if anything, the
11 rates of smoking are generally a little higher
12 than the national trend.

13 Having said that, since the 1950's,
14 rates have generally declined in West Virginia,
15 it hasn't been a smooth, steady decline that
16 reflected events such as the 1964 Surgeon
17 General's Report. I believe that the lowest
18 levels, or that the point at which levels more or
19 less flattened out, was in about 1990 to 1992,
20 and that little progress has been made since
21 then.

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

1 Q. Okay. I appreciate the explanation.
2 But really my question is: Would you expect that
3 at least in ballpark numbers the current
4 prevalence of smoking in West Virginia is about
5 half what it was in the 1950's overall?

6 A. The overall, and by that, you are
7 putting men and women in the same --

8 Q. Correct.

9 A. If you put men and women in the same
10 category, that's in the ballpark.

11 Q. You identified one of those events, that
12 being the release of the Surgeon General's report
13 in 1964.

14 What are the events that you believe to
15 have driven the change in smoking prevalence in
16 West Virginia since the early 1950's?

17 A. On the side of pressures to decrease
18 smoking are health-related events, such as the
19 1964 Surgeon General's Report.

20 On the side of pressures to mitigate
21 that health message and either slow the decline

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

1 if not stall the decline are factors such as the
2 Marlboro Friday price reduction in 1993, the
3 discount brands of cigarettes that make cost less
4 of a factor or reduce the importance cigarette
5 taxes as factors to decrease smoking, the
6 messages from the tobacco industry to undermine
7 or confuse the health messages that were coming
8 out.

9 So these are some of the factors that I
10 believe have been operative.

11 Q. Well, let's start on one side of the
12 ledger, and that is the factors that have tended
13 to influence smoking prevalence to decrease. You
14 identified the release of the 1964 Surgeon
15 General's Report, correct?

16 A. Correct.

17 Q. How and why would that have affected
18 smoking prevalence in West Virginia?

19 A. To the best of my knowledge, West
20 Virginians like people elsewhere in the United
21 States care about their health and act to some

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

1 degree on health messages, and the 1964 Surgeon
2 General's Report was a loud wakeup call with
3 messages that were front line on the newspapers,
4 that there was a serious danger posed by smoking
5 and this was associated with a decline in smoking
6 prevalence for at least a couple of years
7 nationwide and I believe, I don't know the
8 precise numbers in West Virginia, but in West
9 Virginia as well.

10 Q. Was there a decrease in smoking
11 prevalence in West Virginia in the early 1950's,

12 when the first of the major epidemiologic studies
13 of smoking and health were released and
14 publicized?

15 A. I believe that then we began to see a
16 decrease in overall prevalence within the 1950's.
17 I believe it was not until the late 1950's, but I
18 would have to verify that with the numbers.

19 In women, the patterns were different, I
20 believe, that women were either not showing the
21 decrease or during that period possibly still

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

32

1 showing an increase.

2 Q. Was there a decrease in smoking
3 prevalence among the citizens of West Virginia in
4 the 1950's, when the mouse skin painting studies
5 were published in the scientific literature and
6 received wide publicity?

7 A. I don't know which year in West Virginia
8 we began to see changes in trends, and I would
9 have to go back and review those data.

10 Q. Were there decreases in smoking
11 prevalence among the citizens of West Virginia
12 when the warning labels were first placed on the
13 side of cigarette packages?

14 A. Again, I would have to review the
15 year-by-year numbers for West Virginia. The only
16 specific year-by-year numbers I have stated are
17 those in the last four years from records that I
18 have just reviewed.

19 I have such data and it is retrievable.
20 I can discuss the general trends, as we have
21 been. But as to putting a specific number with a

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

33

1 specific event on a specific date, I don't want
2 to imply that I know what the number is and what
3 the year was.

4 Sometimes there is a lag time.

5 Q. Have you made any study of the decreases
6 in smoking prevalence in West Virginia since the
7 early 1950's and attempted to correlate those
8 decreases with external events that might have
9 influenced them?

10 A. I have done that at a general level by
11 looking at nationwide trends, and then within the
12 nationwide trends, there are often specific state
13 data. In some cases, we have extensive state
14 data, and in some cases we have less extensive.
15 The two documents I brought from the Centers for
16 Disease Control, are examples of those kinds of
17 data that look at nationwide trends and then look
18 at the numbers for specific states.

19 I have reviewed such data for the United
20 States; and, again, as I have done that over many
21 years, one of the things that I have always

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

1 attended to is where there are outlier states,
2 because we learn something from the outliers.

3 Q. I have asked you as best you can today
4 to identify for me the major events that have
5 influenced smoking preference among West Virginia
6 citizens in a manner that tended to decrease that
7 prevalence.

8 You have identified for me the 1964 --
9 the release of the '64 Surgeon General's Report.

10 Are there any other major events that
11 you can identify that would have influenced
12 smoking prevalence in that manner?

13 A. The stream of health-related information
14 that followed the 1964 Surgeon General's Report,
15 I believe, was an important factor in the general
16 decline in prevalence over the 1970's and 1980's.

17 So it is not -- I have singled out the
18 1964 report, but there were reports, as you
19 mentioned before then that had some effect.
20 There have been Surgeon General's reports and
21 other health messages and the beginning of other

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

1 events such as the Great American Smokeout and
2 the American Cancer Society, that have had an
3 increasing influence over the years.

4 There have been events such as the
5 marketing of the nicotine gum in the mid 1980's
6 that was associated with an acute bump in
7 apparent increased quitting.

8 Similarly in 1992, with the messages to
9 quit smoking with the nicotine patch marketing.

10 So there are a lot of different kinds of
11 events. I think it is a mistake to ignore any of
12 them. It is a mistake to assume that any one of
13 those explained trends that we see over several
14 years or a decade or more.

15 That's why I am being careful with my
16 answer.

17 Q. I take it, Dr. Henningfield, that theme
18 underlying your answer is that when people are
19 made aware of the health risks of cigarette
20 smoking, that tends to influence the likelihood
21 of their stopping smoking; is that correct?

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

1 A. It influences the likelihood of their
2 trying to stop smoking. And a number of tries is
3 an important determinant of how many people make
4 it.

5 It unfortunately does not, by itself,
6 increase their resources to be able to stop
7 smoking, and that is one of the important missing
8 links that, until recent years, has been largely
9 absent.

10 And I think that West Virginia, if
11 anything, has fewer resources than states such as
12 Massachusetts or California, where there have

13 been stronger, higher levels of resources to
14 provide help for people.
15 Q. As in many endeavors in life persistence
16 is important when attempting to quit smoking,
17 isn't it?
18 A. As in many endeavors in life.
19 Q. The likelihood of decreasing smoking
20 increases with repetitive efforts to quit?
21 A. The likelihood of being a nonsmoker is
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

37

1 associated with how many tries a person has made,
2 and that is where the importance of consistent
3 health messages that are not confused by counter
4 messages from the tobacco industry are important.
5 Q. The average smoker who successfully
6 stops smoking requires four to five serious quit
7 attempts, correct?
8 A. That's in the ballpark. Again, the
9 reason I say in that ballpark, that is a number
10 that I myself have used. It is worth qualifying
11 it as to how you define serious effort.
12 I think that those numbers, if any, are
13 conservative under statements of how many times
14 people actually try to quit. But for the
15 purposes of many surveys, a 24-hour success
16 becomes an objective definition of serious.
17 Again, the reason that under states it is I have
18 known myself people that made what they
19 considered to be an absolutely serious effort,
20 and they could not even make it 24 hours.
21 Q. To clarify, in many of the scientific
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

38

1 surveys that had been done, the benchmark that
2 scientists have chosen to use to define a serious
3 quit attempt is 24 hours of abstaining from
4 smoking, correct?
5 A. Correct.
6 Q. Now, in addition to persistence,
7 motivation is an important factor, with respect
8 to the likelihood of success in stopping smoking,
9 isn't it?
10 A. Motivation is an important factor with
11 all drug addictions, in the ability to stop drug
12 use at all and the ability to sustain abstinence.
13 Q. If you ask someone who is addicted to
14 virtually any drug as to whether or not they
15 would like to quit, they will tell you, yes, they
16 would like to quit, won't they?
17 A. It depends on how you ask the question
18 and what the time frame is. It depends a lot on
19 those things.
20 Q. If someone tells you that they would
21 like to quit using an addicting drug, how do you,
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

39

1 as a professional in this area, evaluate the
2 sincerity of their intention or inclination to
3 stop using the drug?
4 A. I'm not sure what you mean by sincerity.
5 Q. If someone, if a patient will tell you I
6 would like to stop using a certain addictive
7 drug, how do you, as someone who is expert in
8 this area, evaluate how motivated or serious that
9 person is about attempting to stop using the
10 drug?

11 A. Well, it is a deceptively complicated
12 question. Because a lot of people have heard
13 that there is a health risk, and I believe are
14 sincere about their desire to change their
15 behavior.

16 Acting on that desire is, by definition,
17 complicated by the presence of the drug.

18 And so in the absence of an absolutely
19 clear message from a health professional, with
20 the offering of resources to assist the person in
21 quitting, it is difficult to tell from their

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

40

1 behavior what their level of, to use your term,
2 sincerity was.

3 Q. Maybe this is not a fair line of
4 questioning for you. Let me get some further
5 background.

6 Do you actually have any practice in
7 which you work with persons addicted to nicotine
8 or any other substance in attempting to help them
9 stop using the substance?

10 A. I'm a researcher in the area, and in the
11 course of my research, I have worked with and
12 studied many hundreds of individuals who are
13 cigarette smokers.

14 As part of that research, I have talked
15 to the volunteers. As part of that research
16 there is always the option not to participate in
17 the study at various times to provide some
18 resource for quitting. I've also been involved
19 in clinical trials where I am working with people
20 that are on the bench level, the counselors, and
21 offering specific treatment.

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

41

1 What I do not do, as part of my
2 professional activity, is specifically treat
3 individuals myself. So I have, I'm intimately
4 involved in that process, but I'm trying to
5 clarify the distinction here, I'm not sure if
6 that's helpful.

7 Q. I appreciate that. I want to be clear.
8 You do not currently have, and as I understand
9 it, have never had, any type of clinical practice
10 where individuals addicted to a substance came to
11 you personally for help in cessation for using
12 that substance?

13 A. Not professionally.

14 Q. When you say "not professionally" does
15 that mean you have informally attempted to help
16 them?

17 A. Yes.

18 Q. Can you explain that to me?

19 A. Well, actually, there are two categories
20 where I help people to quit. And the very direct
21 category is on the informal side with an

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

42

1 individual who was asking for my guidance.

2 On the formal side, and the reason I did
3 not count this the way you framed your question,
4 is that I teach professionals in methods of
5 smoking cessation therapy; and I am, I think it
6 is fair to say, internationally recognized, as a
7 teacher of how to help people quit smoking, and I
8 am paid for that, for those services.

9 Again, it is a blurry area. It is not
10 that I am not involved in the process, but I
11 don't have a clinic where people come to me and
12 pay me to help them quit smoking; but I teach in
13 national and international settings health
14 professionals as to the state of the art methods
15 that are used to help people quit smoking and to
16 treat tobacco addiction.

17 Q. Other, I should say physicians or other
18 health care providers, do not refer to you
19 patients for assistance in smoking cessation or
20 for helping them attempt to stop using other
21 addictive drugs?

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

43

1 A. What they do on occasion is call me for
2 specific advice, so the patient will remain under
3 their care, but I may get the call from the
4 clinician as to what to do in a particularly
5 difficult or troubling case. The patient remains
6 under that physician's or health professional's
7 care, however.

8 Q. Here is what I am getting at. You know
9 Dr. Neal Benowitz, don't you?

10 A. Yes.

11 Q. He is a friend of yours?

12 A. Yes.

13 Q. A colleague of yours?

14 A. Yes.

15 Q. Obviously, you would respect him as one
16 of the leading authorities in the world, I
17 suspect, on the addictive products of cigarette
18 smoking, wouldn't you?

19 A. Yes.

20 Q. I will represent to you that I have
21 asked Dr. Benowitz in the past to identify for me

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

44

1 objective activities that a smoker can take that

2 are indications of their sincerity to stop
3 smoking, and he has pointed to things like
4 whether or not they solicit help and assistance
5 from their spouse and friends, whether or not
6 they throw away their cigarettes, things like
7 that.

8 On that issue, would you defer to
9 Dr. Benowitz?

10 MR. GRUENLOH: Object to form.

11 A. I think that we both have expertise that
12 bears on that. I do not disagree with him. And
13 as I mentioned earlier, there are ways that you
14 can look at sincerity. It is complicated when a
15 drug is in your body, and I believe that
16 Dr. Benowitz would tell you the same thing.

17 Q. Let me ask you about the awareness of
18 the health risks of cigarette smoking in West
19 Virginia.

20 Have you made any study of the
21 prevalence with which West Virginians hold

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

45

1 certain beliefs about the health risks of
2 cigarette smoking?

3 A. I have not done a comparative analysis
4 for the purposes of this case. I have looked at
5 trends and attitudes in young people, over the
6 years, and my general conclusion has been that
7 West Virginia is generally similar to the United
8 States in its general trends; but, if anything,
9 has somewhat higher levels of smoking prevalence
10 in adults and initiation in youth.

11 Q. As we already discussed, those higher
12 prevalences in current smoking and initiation
13 could be influenced by a number of factors,
14 correct?

15 A. Correct.

16 Q. Let me ask you a few questions about
17 factors that you identified as mitigating against
18 decreasing smoking prevalence, and you mentioned
19 Marlboro Friday, didn't you?

20 A. Yes.

21 Q. Do you have any information that, in
COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

46

1 fact, the prevalence of smoking in West Virginia
2 increased following Marlboro Friday?

3 A. I would have to go back and look at the
4 numbers in the years following and the important
5 thing is not just the absolute number in the
6 year, but numbers in the years immediately
7 preceding and following that event.

8 Q. You also mentioned the sale of discount
9 brands as a factor mitigating against decreases
10 in smoking prevalence, didn't you?

11 A. Yes.

12 Q. I take it that your point on both of
13 these last two factors is that the demand for
14 cigarettes and the prevalence of smoking is

15 related to the price of cigarettes; is that
16 correct?
17 A. Yes, simply stated, the cost of the drug
18 is a factor in the use of that drug.
19 Q. So it is your view that, I take it, that
20 it is your view that cigarettes should be made
21 more expensive, correct?

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

47

1 A. Correct.
2 Q. How expensive do you think a pack of
3 cigarettes should be for a West Virginia citizen
4 that wishes to buy one?
5 A. I don't know.
6 Q. Do you have any ideas about what it
7 should be?
8 A. I believe that West Virginians would
9 benefit if cigarettes cost more, particularly if
10 some of those costs were then used to aid in
11 discouraging young people from quitting and
12 aiding people that are smoking to quit. As to
13 what the specific amount is, that is something I
14 am not prepared to tell you what a specific
15 number of cents increase would be or should be.
16 Q. What price increase do you believe would
17 be necessary to have an important influence on
18 the prevalence of smoking in West Virginia?
19 A. Again, I won't issue a specific monetary
20 value, because the specific value depends upon
21 the manner in which it is implemented, how funds

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

48

1 are used, the options for the citizens, there are
2 too many factors that lead me to the conclusion
3 that the exact value would depend upon many other
4 factors.
5 Q. Let me isolate one factor. What price
6 for a pack of cigarettes do you think would be
7 necessary to have a deterrent effect on current
8 smokers from purchasing cigarettes, without
9 regard to how the moneys would be used to
10 discourage future potential smokers, just to
11 discourage current smokers from continuing to
12 smoke, what price do you think would be
13 necessary?
14 A. Virtually any increase beyond a few
15 cents per pack should make a difference at the
16 population level, and that's as far as I'm
17 willing to go, because the absolute value depends
18 on many other factors.
19 Q. If we go back to the schedule of
20 documents, number four, you were asked to bring
21 with you any and all depositions, medical

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

49

1 records, bills, receipts, hospitalization
2 reports, test results, lab results, population

3 data or other documents in your possession
4 relating to the class representatives, any
5 punitive class members and/or class members in
6 this case. What documents have you brought with
7 you?

8 A. There is some overlap in the questions,
9 so let me tell you what I've got and then you can
10 decide which numbers they match to.

11 Q. Okay. Fine.

12 A. Okay. I have the schedule of documents
13 that I received August 31, 4:34 by fax. I have
14 the third amended complaint that is dated April
15 19, 1999, that I received August 21, 2000, at
16 4:35 by fax.

17 Q. Do you understand that in this case as
18 currently filed there is no claim being made for
19 assistance with smoking cessation for class
20 members?

21 A. Well, frankly, there was some vagueness,
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

50

1 and my belief was that this could eventually
2 contribute to increased smoking cessation
3 available, but my understanding is that the
4 intent is not to provide, not to set up specific
5 treatment services.

6 The reason I don't give you a yes-or-no
7 is that from the perspective of offering people
8 treatment and getting people to try to quit
9 smoking, it is complicated, and it ranges from
10 having a health professional doing an evaluation
11 and a diagnosis and providing encouragement at
12 one end and at the other end of actually
13 providing treatment. This would provide
14 assistance on the end of medical monitoring,
15 which I believe would contribute to the broader
16 goal of getting more people to try to quit
17 smoking.

18 So, again, to me it is not an all or
19 nothing thing.

20 Q. Well, I asked you a narrower question
21 than the one you answered.

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

51

1 I promise you that I am today going to
2 question you about any beliefs you hold and why
3 you hold them with respect to whether or not
4 implementation of a medical monitoring program
5 will have an effect on cessation rates.

6 We will cover that today. The only
7 question I am currently asking you is whether you
8 were aware or not that the third amended
9 complaint currently does not make any request for
10 relief in the form of smoking cessation remedies.

11 A. My understanding is it does not provide
12 for specific treatment clinics or treatments to
13 be available.

14 Q. What other documents did you bring with
15 you?

16 A. This is just the fax cover sheet telling
17 me where this deposition was, an expert
18 disclosure which I had discussed by telephone.
19 This is not signed. I believe I had had this in
20 my records, but was unable to find the original,
21 which presumably was filed many months ago, so it

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

52

1 is possible that the original that I had was
2 destroyed. I just couldn't find it, which is why
3 I asked Ness Motley to fax it to me.

4 Q. Why do you believe that the original
5 disclosure was filed many months ago?

6 A. Well, because some number of months ago,
7 last spring or last winter, I had discussions
8 about the case, where I agreed as to where my
9 opinions may fit into the case; and, frankly, I
10 don't know at what point anything was filed,
11 describing how I would fit into the case.

12 So, you know, I don't know if this was
13 filed or made available three days ago or three
14 months ago. I really don't know.

15 Q. Did you draft your disclosure or did
16 someone else draft it?

17 A. This disclosure was typed at Ness Motley
18 based on materials that I have originally been
19 involved in preparing over the years. And,
20 frankly, as you will see when you look at it, it
21 is basically a very short version that is very

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

53

1 similar to numerous listings that I have worked
2 on over the past approximately three years.

3 Q. Before we leave that topic, for how long
4 have you consulted with or worked with the Ness
5 Motley law firm?

6 A. The initial consulting was in the late
7 fall, early winter, of 1996.

8 It would have been, I believe, November
9 or December of 1996. I don't recall, you know,
10 which month, sometime in that frame. I believe
11 the beginning of December, but about then.

12 Q. On approximately how many cases have you
13 consulted with the Ness Motley law firm?

14 A. The, when I was preparing my summary of
15 cases for my curriculum vitae, in July of this
16 year, that was based on my best available
17 records; and I believe that we are talking about
18 something in the range of eight to twelve; but
19 having said that, where the record is frankly
20 blurry to me is that over the course of the
21 Attorney General's litigation, there were many

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

54

1 cases that were filed that Ness Motley was
2 working on; and so it is possible that there were
3 cases where my general expertise was serving the

4 other cases, but not that I am specifically aware
5 of. It seems like it would be clearer than that,
6 but that's the best I can --
7 Q. No. That's what I expected. The point
8 is that in addition to specific cases, you also,
9 from time to time provide your services to the
10 Ness Motley law firm on general issues that might
11 have implications for more than one case.
12 MR. GRUENLOH: Move to strike counsel's
13 comments prior to the question.
14 MR. FURR: Correct?
15 A. What I do is talk about the science of
16 tobacco addiction. That's the bull's eye of what
17 I talk about. So over these years, I have been
18 frequently consulted about the science of tobacco
19 addiction, about new science, about new findings,
20 and it oftentimes is not clear to me nor does it
21 matter to me how this relates to any specific
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

55

1 case.
2 Q. Do you have a standard fee that you
3 charge the Ness Motley law firm for your work
4 with them?
5 A. Yes.
6 Q. What are those fees?
7 A. It is a two-tiered system; and the
8 initial tier is -- well, the first thing is that
9 I personally don't charge a fee. I personally do
10 not receive a direct fee. Penney Associates
11 charges a fee, and like Penney Associates does
12 for any corporate client, that fee is \$350 for
13 general consulting on a case. When there is work
14 that pertains to depositions or trial testimony,
15 then the rate is \$500 per hour, and in that case,
16 I receive a \$150 per hour bonus, if you will, for
17 that, I guess you would call it, hazard duty.
18 Q. Does that mean that the rate is \$650 per
19 hour or that your personal compensation is
20 increased by \$150 per hour?
21 A. It means that the rate is \$500 per hour,
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

56

1 and I receive an additional compensation beyond
2 my salary of \$150 per hour.
3 Q. Do you hold an equity position in Penney
4 & Associates? In other words, are you a part or
5 full-owner of the company?
6 A. The company is solely owned by John
7 Penney.
8 Q. Can you estimate for me the billings of
9 Penney Associates to the Ness Motley law firm
10 since June of 1996?
11 A. I will do my best. The main figure that
12 I track is the percentage of time figure, so I
13 will answer it in two ways. I'll answer it in
14 percentage of time and I'll answer to the best of
15 my ability in absolute time.
16 In percentage, my Ness Motley billing

17 over this three years has been approximately two
18 percent of my billing. It may at one point have
19 been three or four percent in a six-month
20 interval or less than a six-month interval, but I
21 believe it is two percent, maybe three percent

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

57

1 overall of my time.

2 Put another way, the most recent
3 snapshot I have is this year, and because of this
4 request, I asked our accounting, the person that
5 does our billing what the billing was; and she
6 told me it was about 80 hours over these
7 approximately eight months of the year 2000.

8 Q. Can you provide me any estimates, in
9 terms of dollars billed, for years prior to 2000?

10 A. I would have to sit down with my billing
11 person, with our billing person, to come up with
12 a meaningful estimate.

13 Q. Have the billings of Penney & Associates
14 exceeded \$100,000 a year in any year since 1996
15 to the Ness law firm?

16 A. I don't know.

17 Q. Do you have any expectation as to
18 whether or not the billings would have exceeded
19 \$100,000 for a given year?

20 A. I could sit down and do some
21 calculations based upon my percentages that I

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

58

1 have just given you, but that's what it would
2 take.

3 I keep my focus on science and not on
4 the billings of Penney & Associates.

5 Q. You mentioned that, you identified for
6 me the number of days approximately that you have
7 worked with or on behalf of Ness Motley in the
8 year 2000.

9 Can you tell me approximately how many
10 days a year you would have been working at the
11 request of Ness Motley on smoking health matters
12 in the years '97, '98 and '99?

13 A. I would guess that 1999 was in the range
14 of eight to 15 days. I'm thinking that it was
15 closer to eight, but I think that that range,
16 that range I'm comfortable with.

17 Q. '98?

18 A. '98, let me see, I think '98 was when
19 we went to trial in Washington, wasn't it?

20 Q. I think that's correct.

21 A. Okay. So '98 was more days. '98 should

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

59

1 have been the heaviest year. '98 is also
2 complicated, because there was the Hegans and
3 Berman law firm that I was working mostly for for
4 the Washington state trial.

5 Ness Motley had some involvement. When
6 I say Ness Motley and when I say days for that
7 year, including this year, it is also
8 complicated, because a lot of those days,
9 depending on how you look at them aren't for Ness
10 Motley, they are for the tobacco industry in the
11 sense that I have been deposed by the tobacco
12 industry.

13 Our billing, through our billing person,
14 it is going to Ness Motley. I'm not sure how you
15 break that out, you know, those days as apart
16 from preparation for a deposition or reading
17 literature that I have been mailed by Ness
18 Motley. It would take some effort to try to sort
19 it out.

20 Q. Rather than parse it out like that, let
21 me ask the question differently because I may

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

60

1 have been misunderstanding you.

2 Provide to me an estimate, please, on
3 approximately how many days per year since 1997,
4 you have worked on matters related to smoking and
5 health litigation; let me ask you to include
6 reviewing materials in preparation for
7 formulation of your opinions, preparing for
8 depositions, actual testimony at deposition and
9 trial and any other activities for which you
10 would have billed either Ness Motley or some
11 other law firm representing the plaintiffs or the
12 defendants.

13 A. A couple of days per year, I mean, per
14 month.

15 Q. So that would be approximately 10
16 percent of your time then, correct?

17 A. The overall average of the, since 1996,
18 I believe, has been a grand total in the range of
19 three to four percent of my billing time.

20 And I say that because sometime, I
21 believe, in the spring of this year, I asked our
COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

61

1 billing person, I think it was before one of my
2 depositions, I don't know if I was frankly asked
3 this, but it was before a deposition, that I
4 asked my billing person, because I thought it
5 might come up, and I believe that it was around
6 three or four percent of my time over those three
7 years.

8 Q. Okay. What other documents did you
9 bring with you?

10 A. Let's see, I have the, a copy of Neal
11 Benowitz deposition, from Tuesday, August 15.
12 Now, you can keep this, it doesn't matter to me
13 if I get it back or not. It doesn't have any
14 marks or notes.

15 Q. I have my own copy.

16 A. Okay. You don't want an extra one for
17 the airplane to come back.

18 Q. That's the deposition in this case,
19 isn't it?

20 A. Right.

21 Q. Why did you review that deposition?

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

62

1 A. It was E-mailed to me to review, and
2 there was no specific purpose, other than -- but
3 there is a general purpose. And the general
4 purpose is that as part of my preparation for
5 depositions, I find it very helpful to review my
6 own depositions and those of other people whose
7 expertise have some overlap, frankly just to --
8 I'm not sure what the right word is -- I was
9 going to say get in the mood for a deposition
10 process, but I guess switch gears to this type of
11 process, which is the, even though I've done it a
12 number of times, is still a bizarre sort of
13 process for a scientist in many ways.

14 Q. It is for me, too, we'll work through
15 it.

16 A. Thank you, if you have any insights, can
17 you share them with me, maybe.

18 Q. Did you request the depositions?

19 A. I did not formally request it, and, you
20 know, I don't know if it was in a conversation
21 learning that they had, meaning those two

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

63

1 individuals, Burns and Benowitz, had been
2 deposed, that I asked if I could look at it or if
3 it was simply offered. I don't recall. I did
4 not make a formal request. If I had not received
5 it, it wouldn't have mattered much.

6 Q. Who, specifically, sent it to you?

7 A. Mr. Gruenloh, I was speaking to on the
8 telephone, and he had it sent to me.

9 Q. Did Mr. Gruenloh suggest to you that you
10 examine the deposition with respect to any
11 particular issues or any particular questions or
12 answers or did he direct your review of the
13 deposition in any way?

14 A. There was absolutely no guidance that
15 was offered at all.

16 Q. Have you reviewed the deposition?

17 A. Yes, I did.

18 Q. And as you reviewed the deposition, did
19 you identify any responses by Dr. Benowitz for
20 which you disagreed with his response?

21 A. Well, first I was not looking at it as

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

64

1 closely -- I'm not sure how closely you think I
2 look at these.

3 I spent, I believe, approximately two
4 hours, meaning -- or with his maybe it was a
5 little over an hour, you know, less than a minute

6 a page.

7 So it is possible there was something in
8 there, that if I looked closer that I might have
9 disagreed with.

10 There were any number of things that I
11 might have stated differently, just because I'm a
12 different person in the same way when I look at
13 my own depositions, there are many things I might
14 have stated differently.

15 But there were not important areas of
16 opinion where I believe I am in disagreement with
17 Dr. Benowitz.

18 Q. Did you identify any areas of fact or
19 opinion, that you are in disagreement with
20 Dr. Benowitz on with respect to the answers you
21 provided in that deposition?

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

65

1 A. There were areas where a line of
2 questioning was going in a direction and where
3 the questioning was fairly narrow and specific,
4 and it is possible that, had it kept going in
5 another direction -- let me restate that.

6 There are areas where there was a
7 specific line of questioning, where someone might
8 have come to the conclusion that his opinion and
9 my opinion differed somewhat; and that occurred
10 to me a couple of times.

11 But in those areas, I believe that had
12 he been asked appropriate follow-up questions, it
13 would be clear that he and I are of very similar
14 opinions on the science of tobacco addiction.

15 I'm sorry that's not a simple yes or no.
16 The subject matter is complicated. There are a
17 lot of ways to answer any given thing. There are
18 a lot of things that you can choose to emphasize,
19 and not being in a room with a person, not
20 knowing, being in that situation, makes it hard
21 to evaluate, just simply because at any given

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

66

1 point you might choose to emphasize one aspect of
2 the science more than another aspect. I think
3 the bottom line, maybe I just should have said
4 this in the first place, is that I believe on the
5 science that was discussed and the opinions that
6 were issued, that my views and opinions are
7 similar to Dr. Benowitz.

8 Q. Okay. I just want to be clear about
9 this latter point, because I'm not really asking
10 you whether you believe that would have provided
11 different answers to questions that weren't asked
12 during the deposition.

13 My only question is whether you
14 identified statements of fact or opinion by
15 Dr. Benowitz, in response to questions that were
16 asked during the deposition, to which you
17 disagree?

18 A. No. I believe I'm in agreement with

19 Dr. Benowitz's opinions.
20 Q. Okay. What other documents did you
21 bring with you?

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

67

1 A. The same thing for Dr. David Burns, who
2 was deposed on August 9, 2000, and the other
3 marking on this page is the yellow highlighting
4 of his name and date. This is a longer
5 deposition, more than 300 pages, I believe.

6 Q. You understand, don't you, that
7 Dr. Burns has now been named in this case as an
8 expert on nicotine, don't you?

9 A. You know, I haven't seen his expert
10 statement, so I am not sure. There are overlaps.

11 Q. His deposition did not deal with or
12 focus on issues of nicotine addiction, did it?

13 A. Not specifically, but there are areas of
14 overlap between his areas of expertise and mine.
15 He, for example, is questioned much more about
16 the medical monitoring program than would be
17 appropriate for me.

18 He wasn't asked some of the kinds of
19 questions that would be more appropriate for me,
20 but he also was asked and talked about issues
21 that are relevant, such as nicotine dosing

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

68

1 capacity of cigarettes and how they are marketed
2 and so forth.

3 MR. GRUENLOH: Can we take a quick
4 restroom break?

5 MR. FURR: Sure.
6 (Break.)

7 Q. Dr. Henningfield, what other documents
8 have you brought with you today?

9 A. Here is the Burns. Do you want that
10 one?

11 Q. I do not want that one.

12 A. And I have expert affidavits from Edward
13 Workman and Theodore Wilson, and that is all of
14 the documents that I have.

15 Q. May I see the expert affidavits that you
16 just described?

17 A. Sure.

18 Q. You have Theodore Wilson's affidavit
19 from the McKuhn case dated August 8, 199 -- dated
20 July 8, 1999, correct?

21 A. Correct.

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

69

1 Q. Who provided you this affidavit?

2 A. I believe that Ann Rider's office, and
3 one of the affidavits or maybe both of them have
4 a note in my handwriting in the upper right-hand
5 corner, I don't always do this, I should, this
6 says from Ann Rider, 3/22 and the other one --

7 Q. Says the same thing?
8 A. So I'm quite certain that was 3/22 of
9 2000.
10 Q. Did you review Theodore Wilson's
11 affidavit?
12 A. I did.
13 Q. For what purpose?
14 A. It was sent to me by Ann Rider's office,
15 and I read it.
16 Q. What issues does it deal with?
17 A. Basically, it is a history of various
18 kinds of events over the years pertaining to the
19 health effects of tobacco, ranging from
20 mentioning Reader's Digest articles to
21 advertising campaigns, to public health messages,
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

70

1 citizens groups against tobacco.
2 Q. Did the information contained in that
3 affidavit affect your opinions in any way,
4 including reinforcing what you intend to express
5 in this case?
6 A. No.
7 Q. When you reviewed Theodore Wilson's
8 affidavit, did you find in it statements of fact
9 or opinion with which you disagreed?
10 A. There was the implication, and I don't
11 recall how it was stated. I would have to go
12 back and look at it. But the context of the
13 implication was that the citizens of West
14 Virginia should have been thoroughly
15 knowledgeable about the toxic and addictive
16 effects of tobacco and to the extent to which
17 that was intended, I disagree.
18 But as to referencing specific documents
19 and events, to the best of my knowledge, the
20 specific documents and events that were cited and
21 footnoted, I believe, are true.
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

71

1 Q. You also reviewed the affidavit -- well,
2 let's mark that.
3 A. May I have that -- I'm not sure I need
4 these back at all, I have copies, but I don't
5 recall any notes in any of them, so it doesn't
6 make any difference.
7 (Whereupon, Henningfield Deposition
8 Exhibit No. 5, Wilson affidavit, marked.)
9 Q. Dr. Henningfield, for the record, verify
10 for us that what we have marked as Deposition
11 Exhibit 5 is the affidavit of Theodore Wilson
12 that you and I were discussing.
13 A. That's correct.
14 MR. FURR: Mark this as 6, please.
15 (Whereupon, Henningfield Deposition
16 Exhibit No. 6, Workman affidavit, marked.)
17 Q. Dr. Henningfield, verify for us that
18 what we have marked as Deposition Exhibit 6 is
19 the copy of Edward Workman's affidavit that you

20 brought with you to the deposition?
21 A. That's correct.
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889
72

1 Q. Did you review this affidavit?
2 A. Yes, I did.
3 Q. For what purpose?
4 A. It was sent to me, and so I read it.
5 Q. What subject matter does this affidavit
6 deal with?
7 A. It addresses the topic of tobacco
8 addiction.
9 Q. Did you find, within this affidavit,
10 statements of fact or opinion to which you
11 disagreed?
12 A. Yes.
13 Q. Can you identify those for me, please.
14 MR. KLEIN: Can you get the date of the
15 affidavit?
16 A. Yes.
17 Q. What is the date of that affidavit,
18 Doctor?
19 A. This was signed on the 28th of February,
20 2000. I will have to take a -- I haven't looked
21 at this recently, I mean I just picked it up and
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889
73

1 paged through it, so if you like, I can, I
2 disagreed with a lot of what was in there. I was
3 frankly amazed that this person was qualified as
4 an expert on tobacco addiction.
5 Q. Let's stop for a minute and make copies
6 of it, so we can all follow along with you.
7 A. Sure.
8 Q. While copies are being made, let me ask
9 you if you have brought any other documents with
10 you?
11 A. No. That is all.
12 Q. I take it then that you have not
13 reviewed depositions of any other witnesses in
14 this case, including the named class
15 representatives?
16 A. Correct.
17 Q. Have you reviewed the medical records of
18 any of the named class representatives in this
19 case?
20 A. No. I have not.
21 Q. Have you reviewed any type of records
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889
74

1 with respect to the named class representatives
2 in this case?
3 A. No. I have not. Well, let me take that
4 back. The CDC MMWR reports that provide smoking
5 prevalence data obviously relates to the class,
6 but I have not been given materials by Ness
7 Motley that specifically pertain to this class or

8 this case.

9 Q. Have you received materials that
10 specifically pertain to this class or this case
11 from any source, other than Ness Motley?

12 A. No. I have not.

13 Q. Other than the exhibits that we marked
14 as your Deposition Exhibits 3 and 4, have you
15 viewed, reviewed any materials or documents of
16 any type that provide information specific to
17 West Virginia?

18 A. This is my entire Blakenship file. As I
19 mentioned earlier, over the years, I tracked
20 national smoking trends, I would look to see
21 what's happening in West Virginia and other

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

75

1 states, but that's at a more general level.
2 That's part of what I do as a professional in the
3 area.

4 Q. So in preparation to testify in this
5 case, you have reviewed no West Virginia specific
6 materials other than those we have marked as
7 deposition Exhibits 3 and 4; is that correct?

8 A. Correct.

9 Q. Do you have any additional work that you
10 intend to do prior to testifying in this case?

11 A. Prior to testifying, I believe it will
12 be important to see where my expertise is
13 relevant and how it fits, and I anticipate
14 working with the plaintiffs to put together the
15 materials that are most relevant from among those
16 materials that were used in the Washington State
17 trial and have been discussed at numerous other
18 depositions.

19 Q. See if I understand it. Are you saying
20 that prior to testifying, you anticipate working
21 with plaintiff's counsel to help them identify

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

76

1 specific documents that you believe you should be
2 questioned about?

3 A. I'm not sure that it is that specific.
4 What I anticipate is that I would be asked about
5 areas of tobacco dependence that are relevant and
6 that consideration for my opinions would be
7 taken, and that I would be assisted in that
8 general way, that the field of tobacco addiction
9 science is a very large area.

10 Over the years, I have looked at a lot
11 of documents, and so I would expect that my
12 opinion would be considered as to what materials
13 I think are particularly relevant.

14 I don't know the degree to which, you
15 know, we would actually follow that.

16 Q. When you say you would work with
17 plaintiff's counsel to identify the most relevant
18 materials from the Washington State trial, are
19 you referring to identifying tobacco company
20 documents that you believe should be used in your

21 examination?
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889
77

1 A. In part.
2 Q. What else are you referring to?
3 A. Oh, the 1996 or '97 National Cancer
4 Institute monograph which discusses cigarette
5 dosing.
6 Q. Is that monograph seven?
7 A. Yes. The purple monograph. The 1988
8 Surgeon General's Report. The Food and Drug
9 Administration proposed and final rule. Those
10 would be the general.
11 Q. Do you intend prior to trial to gather
12 any further information or formulate analyses or
13 formulate specific opinions specific to this
14 case, this class, or the State of West Virginia?
15 A. I would expect to review my files that
16 describe trends in prevalence of smoking over the
17 years, as pertains to some of the questions you
18 were asking me earlier today.
19 Again, this is the sort of thing that I
20 think would be, that I would do if I was giving a
21 lecture to medical professionals in West Virginia
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889
78

1 or that I think would be appropriate in
2 preparation for the trial.
3 MR. FURR: Mr. Gruenloh, let me note on
4 the record that if Dr. Henningfield does
5 additional work, or reviews additional materials,
6 that put him in a position to express opinions
7 that are fairly called for by my questions today,
8 but for which today he is unprepared to offer
9 those opinions, then obviously we would like to
10 be notified that he has additional opinions, so
11 that we can discuss the opportunity to conduct
12 discovery on those opinions.
13 MR. GRUENLOH: That will happen if his
14 opinions substantially change.
15 MR. KLEIN: Well, I object to that. To
16 the extent this witness reviews any further
17 documents to form the basis of his opinion at
18 trial, those documents were called for in this
19 notice, and we're entitled to know about that,
20 what conclusions he draws from those documents.
21 Otherwise, it would be a total failure
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889
79

1 of compliance with the requests that were made
2 and we would have been denied any meaningful
3 discovery of this witness.
4 THE WITNESS: Since I will, I assume, be
5 asked about this, maybe you could clarify for me
6 the difference between what I do as a
7 professional in this area and as a scientist,
8 which is virtually every day of the year reading

9 material, as opposed to what would, what I should
10 bring to your attention, that is specific or
11 might alter my opinions.

12 MR. FURR: That's a fair question. I
13 understand your point. We all understand that as
14 one who works in this field, that you are likely
15 to continue reviewing additional and new
16 information that develops in the field as it is
17 made available.

18 If that information substantially
19 impacts upon your opinion, we would like for you
20 to alert Mr. Gruenloh to that.

21 Second, if outside your normal
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

80

1 activities of reviewing new and extant literature
2 you engage in work that is directed or related
3 specifically to the opinions that you will
4 express in this case, then we also want you to
5 notify Mr. Gruenloh of that, including the review
6 of new documents for the purposes of formulating
7 your opinions in this case.

8 THE WITNESS: Sure.

9 MR. FURR: Does that clarify it?

10 THE WITNESS: Yes, that is really
11 helpful. Thank you.

12 MR. GRUENLOH: And, Jeff, we'll do what
13 is appropriate under the rules of West Virginia.

14 Q. Dr. Henningfield, let me hand you Edward
15 Workman's affidavit. Everyone have a copy of it
16 at the table now?

17 Let me ask you to -- by the way, you
18 don't need to comment on Dr. Workman's
19 qualifications, because that is something neither
20 you nor us can resolve today. It is of no
21 moment.

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

81

1 But what I do want you to do is identify
2 for me statements of fact or opinion in this
3 affidavit that you disagree with?

4 A. Sure. Since this is not annotated and I
5 haven't looked at it in detail for some number of
6 months, I'm not going to spend a lot of time, but
7 bear with me as I skim through it page by page
8 and I will highlight a couple of particular
9 issues.

10 On item number five, page two, line
11 three, he states that: "Have argued (in a
12 circular fashion), both implicitly and
13 explicitly, that people smoke both because they
14 are quote addicted closed quote to nicotine."

15 The notion that this is a circular
16 argument, I disagree with, and implies that
17 somehow he is not aware of the vast literature
18 that has established the addictive effects of
19 nicotine independently of what we see in
20 epidemiological studies of people smoking.

21 Later in that paragraph, certain aspects

1 of it are, where he says: "It is implied that if
2 a person smokes, then they are addicted to
3 nicotine, and that, thus, they smoke because of
4 some "addictive" property inherent in nicotine."
5 Now this is, maybe it is just his style, but in
6 the context of the sentence and the use of the
7 word "implied" suggests that he disagrees with
8 this.

9 Now, of course, it is not as simple as
10 anyone that smokes a cigarette, judging that they
11 are addicted, neither I, nor I think most health
12 professionals, would come to that conclusion.

13 But if a person is a cigarette smoker at
14 some level, they likely are exhibiting signs of
15 dependence. To the degree that he disagrees with
16 that, I disagree with him.

17 Q. Let me ask you about this. If you have
18 read Dr. Benowitz's deposition you will know I
19 asked him the same question. Identify for me the
20 information that you need to know about any given
21 individual in order to evaluate whether or not

1 that individual is addicted to nicotine?

2 A. Well, the first thing is that addiction,
3 since we are going to talk about the diagnosis,
4 I'm going to use the more technical term
5 dependence, dependence is not an all-or-nothing
6 phenomenon.

7 There are signs of dependence that
8 generally increase as a function of different
9 factors, and your confidence that a person shows
10 signs of dependence are related to a number of
11 observable facts.

12 The first is that the cigarette smoking
13 occurs on a daily basis. That's an important
14 basic fact. It doesn't mean that there might not
15 be some days that smoking doesn't occur, but that
16 that is typical.

17 The fact that increases your confidence
18 that someone is physiologically dependent is that
19 they are more likely to smoke right away in the
20 morning than less likely. This is a more
21 stringent criteria, and I don't believe that you

1 need this to judge that a person will benefit
2 from advice to stop and from aid in quitting.

3 So the basic finding is a simple one,
4 and was derived over many years of study, and
5 that is that cigarette smoking is occurring
6 daily, and that that implies that some level of
7 dependence exists.

8 So you asked me more of an all or none.
9 Now, that is not the same as a DSM diagnosis that

10 that might be useful to do for the purposes of
11 specific treatment, but is not considered
12 necessary by the U.S. Public Health Services for
13 the purposes of offering assistance to quit.

14 I'm sorry that it is not a simple
15 yes-or-no answer.

16 Q. Well, I didn't ask a yes-or-no question.
17 I asked you to list for me the types of
18 information that you would need to know in order
19 to evaluate whether a specific individual is
20 addicted or dependent. You listed whether they
21 smoke on a daily basis first, and second you said

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

85

1 it is also of interest as to their likelihood of
2 smoking the first cigarette early in the morning,
3 correct?

4 A. Correct.

5 Q. Is that all you need to know?

6 A. Well, no, and the second one, the
7 likelihood of smoking, I gave as an example of
8 additional information that tells you more about
9 that individual.

10 But over years of study, it is now clear
11 that if somebody has smoked 30 out of the last 30
12 days, that the vast majority of those people have
13 been smoking daily for the past year and are
14 smoking more than five cigarettes per day and
15 show signs of dependence.

16 And cigarettes, frankly, are an unusual
17 drug in this respect, that you can infer with a
18 great deal of confidence so much from that simple
19 question.

20 Q. Well, now it seems to me as though you
21 have added some additional criteria.

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

86

1 Let me ask it this way: Is a smoker who
2 smokes one cigarette a day addicted?

3 A. They may show some signs, but again you
4 have made it a threshold, an all-or-nothing, are
5 they addicted, I don't know if a person that
6 smokes one cigarette, if an individual that
7 smokes one cigarette a day is addicted. But from
8 a health perspective, one cigarette per day is
9 damaging, and it would be very important for
10 health professionals to do everything possible to
11 make sure that that person understands that one
12 cigarette per day damages their health and that
13 they should make every effort to cease that
14 cigarette per day.

15 Q. That wasn't my question, but,
16 Dr. Henningfield, identify for me every
17 epidemiologic study in world that demonstrates
18 that one cigarette per day increases the risk of
19 any disease?

20 A. What was the question?

21 Q. Identify for me every epidemiologic

COURT REPORTING CONCEPTS, INC.

1 study that has ever been published anywhere that
2 demonstrates that smoking one cigarette per day
3 increases your risk of developing any disease.

4 A. Let me refer you to a couple of major
5 studies, and some of these are compilations of
6 studies.

7 One major series of studies that has
8 been conducted in two waves is the American
9 Cancer Society studies in which more than a
10 million individuals were studied in the cancer
11 prevention study one and two, which have a
12 category for, I believe, one to nine cigarettes,
13 which shows elevated risk, beyond no smoking.

14 Now that, of course, includes some
15 individuals that smoke one and some individuals
16 that smoke nine cigarettes per day.

17 Another large compilation of evidence
18 that bears on this topic are the environmental
19 smoke analyses that have been compiled in the
20 form of the 1996 Surgeon General's Report, which
21 I believe was titled involuntary smoking, and the

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

1 Environmental Protection Agency's report which
2 came out, I believe, a year or so later.

3 Both of those studies look at dose
4 effects based upon environmental exposure, and
5 their analyses lead to the clear conclusion that
6 the equivalent to one cigarette per day is
7 damaging to health.

8 I didn't say that the one cigarette per
9 day was a minimum threshold, but certainly at
10 that level, there is an increased risk to health.

11 Q. I don't want to get side tracked of
12 this. But you are really not very certain about
13 those environmental tobacco smoke studies that
14 you just cited, are you?

15 A. What is the question?

16 Q. The Surgeon General did not publish a
17 volume on involuntary smoking in 1976, did he,
18 sir?

19 A. Oh, I'm sorry, 1986. Goodness, time
20 flies when you have kids.

21 Q. The Environmental Protection Agency
COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

1 released its report in 1992, isn't it?

2 A. Yes. I'm sorry.

3 Q. Let's not get side tracked on this. Let
4 me go back. A couple of times in response to my
5 earlier questions, you were asked whether or not
6 an individual has shown signs of dependence.
7 What are these signs of dependence?

8 A. Well, they include signs that are often
9 used as -- there are a couple of categories.
10 There are what I might call the official signs

11 and symptoms that are listed by the American
12 Psychiatric Association in its Diagnostic and
13 Statistical Manual.

14 Q. DSM-IV?

15 A. DSM-IV being the most recent, and by the
16 International Classification of Disease of the
17 World Health Organization, which is generally
18 similar though not identical. The most recent
19 versions, the ISD-10, DSM-IV having come out in
20 1994, and ISD-10, I believe, in '92.

21 And then there are what are sometimes
COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

90

1 called proxy, meaning that they are other ways of
2 ascertaining likely dependence, that are used in
3 broad national surveys.

4 These are used in part to compare drugs
5 ranging from cigarettes to cocaine to alcohol.

6 These are signs such as have they used
7 more than originally intended, have difficulty
8 quitting, and these are often related to the
9 amount of drug use per day, whether that is
10 drinks of alcohol, cigarettes per day or, in some
11 cases, amounts used in the past month.

12 So there are a variety of kinds of
13 information that bear on this topic, and all of
14 which I consider relevant in my opinion.

15 Q. What are these official criteria that
16 you identify as being part of the schemes
17 embodied in DSM-IV and ISD-10 categories that are
18 signs of dependence?

19 A. Well, for example, in the case of the
20 DSM, there are two different diagnostic
21 categories. One is the nicotine dependence

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

91

1 syndrome and the other is the nicotine withdrawal
2 syndrome.

3 The nicotine dependence syndrome is
4 described as a maladaptive pattern of persistent
5 use. And it is described as under the criteria
6 for drug dependence diagnosis in general, of
7 which for any given drug, not all of the criteria
8 may equally apply, but the approach is to
9 determine if three or more symptoms have been
10 demonstrated over the past year, as a threshold,
11 if you will. It doesn't mean that people that
12 show two symptoms have no dependence, but that is
13 the basis for an objective diagnosis.

14 Now, for the dependence, that can
15 include withdrawal as one of the criteria. It
16 can include tolerance as evidenced by increased
17 use than original.

18 It can include use in the face of harm.
19 There are a variety of others. I don't recall
20 the precise wording, but there are a variety of
21 other kinds of symptoms, use in the face of

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

1 social, again, I don't recall the exact wording,
2 but use when use has negative social consequences
3 is another type.

4 For the nicotine withdrawal syndrome, in
5 this case, the diagnostic criteria are more
6 specific to nicotine and they include things like
7 symptoms and signs such as increased heart rate,
8 anxiety, increased anger, difficulty
9 concentrating, sleep disturbance, I believe GI
10 distress is back in DSM-IV, it was out in DSM-III
11 three, and I think that reflects the
12 science-based approach that is used in these
13 criteria. Craving is listed as a potentially
14 important component, but is not on the list of
15 nine or ten specific symptoms.

16 So there are a variety of things I'm not
17 attempting to give you every one, but to give you
18 a sense of the DSM approach.

19 Q. We got into this, because I asked you
20 the question of what you need to know to make a
21 determination of whether or not a smoker is

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

1 addicted and dependent on nicotine.

2 Let me ask you this question: Is an
3 individual that has for a year smoked one
4 cigarette per day, but who has never attempted to
5 quit and who does not want to quit and who
6 believes themselves to be experiencing no health
7 effects from that cigarette per day addicted or
8 dependent on nicotine?

9 A. I don't know.

10 Q. Why not? What else do you need to know?

11 A. Well, here again, the difficulty, why
12 this is difficult is because I work at two levels
13 with cigarette smokers. And one is the public
14 health level, which overlaps with a class type of
15 definition.

16 And the other is at the individual level
17 of what do you do when confronted with trying to
18 help a particular individual try to quit smoking
19 and what is the best course for that individual.

20 At the public health level or the class
21 level, it is a reasonable assumption that

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

1 somebody that is smoking every single day, either
2 has not been properly informed and should, or
3 that they have been informed, we should make sure
4 that they have resources to help them cease that
5 behavior.

6 If they refuse, there is not much we can
7 do about that. But I believe that it is
8 important to offer the resources in case they are
9 experiencing difficulty.

10 Q. Finished?

11 A. Yes.

12 Q. Dr. Henningfield, I'm really not sure
13 what question you thought I asked, but here is
14 the question I asked. The question I asked is:
15 What additional information do you need
16 to know to determine whether or not the
17 individual that I described is addicted or
18 dependent on nicotine?

19 MR. GRUENLOH: Object to the form of the
20 question, argumentative, asked and answered.

21 MR. FURR: Go ahead.

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

95

1 A. Okay. If we shift from the public
2 health effort, which is the approach of the U.S.
3 Public Health Service, including its recent
4 smoking treatment, Tobacco Dependence Treatment
5 Guideline, and shift from that to what do you do
6 if an individual shows up at your door or you
7 have been given a specific case for that
8 individual case, it would be reasonable to ask
9 some questions.

10 Now, you posed a hypothetical where you
11 have already described some things that are
12 relevant. I believe in your hypothetical case,
13 you said the individual was not aware of health
14 risk or not concerned with health risk.

15 Q. Let me start again. You have an
16 individual that smokes one cigarette per day, who
17 does not want to quit smoking, who has never
18 attempted to quit smoking, and who does not
19 believe themselves to be experiencing currently
20 any harmful effects from the cigarette that they
21 are smoking each day, I ask you whether that

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

96

1 individual was addicted or dependent on nicotine
2 and you told me you did not know, you would need
3 additional information. My question is: What
4 else do you need to know about that person?

5 A. Well, the way you have framed this
6 hypothetical, I guess I'm confused. I don't see
7 the point. The person doesn't want to stop,
8 doesn't believe that harm is occurring, it would
9 be important, from a public health perspective to
10 do your best to make sure that the person
11 understands what the consequences of that daily
12 smoking are.

13 Q. Excuse me, Dr. Henningfield, do you
14 understand what I am asking you?

15 A. I'm frankly confused.

16 Q. I want this to be very clear. When I
17 ask you what information you needed to know to
18 determine whether or not an individual was
19 addicted or dependent on nicotine, the only
20 criterion that you identified for me was whether
21 or not that person smoked daily. That's an

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

1 answer that I am trying to probe as to whether or
2 not, when you think about it, you will come to
3 the conclusion that there is additional
4 information that you need to know in order to
5 make that decision, that's the issue I'm trying
6 to get at.

7 A. Either I misspoke or you
8 mischaracterized my statement, because it is not
9 that you only need to know if the person smokes
10 every day to know if they are addicted.

11 What smoking every day tells you is that
12 that there is a high probability that dependence
13 exists.

14 Q. Let me ask the baseline question again,
15 rather than to debate how we got off track.

16 What information do you need to know to
17 determine whether or not a specific individual is
18 addicted or dependent on nicotine?

19 A. It depends on what the purpose is for.
20 If the purpose is a billing purpose, for example,
21 where billing is related to DSM, then for that

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

1 billing purpose, you, by definition, need to do a
2 DSM diagnosis.

3 If the purpose is to determine if
4 treatment should be offered and may be useful, as
5 was discussed in this U.S. Public Health Service
6 guideline that came out this June, it is quite
7 simple. If the person is smoking, treatment
8 should be offered, because that implies some
9 level of dependence.

10 Now, upon that offering, we frankly
11 learn more about that particular individual; and
12 this is where the education and treatment
13 offering are frankly part of the process I'm
14 focusing on this individual.

15 So there is no simple answer to this.

16 Q. Let me try to understand the answer you
17 gave.

18 Is it your position that anybody who
19 smokes on a daily basis is dependent or addicted
20 to nicotine?

21 A. No.

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

1 Q. What else do you need to know, to
2 determine whether or not they are dependent or
3 addicted to nicotine?

4 A. If they smoke, we need to make efforts
5 to advise them to stop and to aid their efforts
6 in stopping, in terms of determining level of
7 dependence, there are specific questions we can
8 ask, for example, how many cigarettes per day,
9 when the first cigarette of the day is.

10 We can even ask questions that are
11 specific to cravings, and patterns of smoking.
12 There are a whole range of things that can be

13 asked. In principle, if we are going to
14 prescribe medication, such as a nicotine
15 replacement medicine, or if the person is a
16 consumer buying an over-the-counter medicine, the
17 number of cigarettes smoked per day is a factor
18 in determining the right dosage for the
19 individual.

20 So, again, there is no simple answer.
21 It depends what the purpose is in getting the

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

100

1 information.

2 Q. Okay. Try this one then. Assume that
3 you are an expert that has been asked to offer an
4 opinion to a reasonable degree of medical or
5 scientific certainty in a trial as to whether or
6 not a specific individual is addicted or
7 dependent on nicotine. What information do you
8 want to know about that person?

9 A. The first question that I would ask is:
10 Is smoking daily?

11 The second would be: How many cigarettes
12 per day?

13 The third would be: When is the first
14 cigarette of the day?

15 Probably the fourth would be: How long
16 the person has been smoking?

17 What I am describing is a hierarchy of
18 kinds of questions. The answers at each level
19 give me more confidence in making a judgment.
20 And again, the purpose of the diagnosis cannot be
21 left out.

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

101

1 If the purpose is to obtain
2 reimbursement --

3 Q. Wait a minute. Excuse me. I'm not
4 interrupting you to be rude, but I want you to
5 focus on the question at hand. I told you what
6 the purpose was.

7 A. No. You didn't.

8 Q. The purpose was you have been asked to
9 testify as an expert at trial. Assume it is in a
10 smoking and health case.

11 A. Okay.

12 Q. And addiction or dependence is being
13 offered as an explanation as to why this
14 individual continued smoking in light of having
15 been made aware of the health risk of smoking.

16 What information do you, as an expert,
17 need to know before you can offer an opinion to
18 the requisite degree of certainty as to whether
19 or not that individual is dependent or addicted
20 to nicotine?

21 A. Well, you are making it into an all or
COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

102

1 nothing, that they are or are not. And frankly,
2 in diagnoses there is frequently a continuum, and
3 the continuum is inferred by the number and
4 severity and sometimes the qualitative nature of
5 the symptoms. And that, in turn, affects what
6 label you use.

7 A person that is smoking cigarettes
8 every day is showing one sign of being dependent
9 on cigarettes. It is one sign that is an
10 important sign, that tells an expert in the field
11 a lot, because we know that the vast majority of
12 people that have smoked every day for the past 30
13 days, have smoked every day for several years and
14 have been smoking several cigarettes per day.
15 That simple question gives me a high degree of
16 confidence in that.

17 It does not provide absolute certainty.
18 By asking more questions I increase the level of
19 certainty.

20 Q. Are you able to reach a conclusion as to
21 whether or not an individual is addicted or

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

103

1 dependent on nicotine without knowing anything
2 about whether and how they have ever attempted to
3 stop smoking?

4 A. If they are in the United States, where
5 there is some information about the health
6 consequences, as inadequate as I think it is, but
7 at least there is some information, and the
8 person has been smoking every day, that is an
9 important sign that there is a probability that
10 the person exhibits dependence, because the vast
11 majority of people that show that sign show a
12 number of other signs as well.

13 Q. So is that a yes?

14 A. I'm not sure. You will have to judge
15 that. That's my best answer.

16 Q. Do you remember what the question was?

17 A. I'm not sure that I could restate it.
18 But I answered it to the best of my ability.

19 Q. Let me restate it, because I think you
20 might have gotten lost on the question.

21 My question is the following: Can you
COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

104

1 reach an opinion as to whether or not an
2 individual is addicted or dependent on nicotine
3 without knowing anything about whether they have
4 ever attempted to quit, and if so how?

5 A. That it?

6 Q. That's it.

7 A. I can issue an opinion on the
8 probability based on that information, and the
9 confidence in the opinion would be increased with
10 additional information that may or may not be
11 implicating for that individual.

12 Q. So as I read all your answers together,
13 it sounds to me like all you really believe you

14 need to know is whether they smoke on a daily
15 basis?

16 A. That's not quite what I said.

17 From a public health perspective, if
18 they are smoking on a daily basis, that is of
19 concern.

20 From a diagnostic perspective, that
21 factor is strongly correlated with a number of
COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

105

1 other factors; and depending on what you wanted
2 to do with the information or the consequences,
3 it may or may not be worth conducting a full
4 evaluation.

5 For example, the U.S. Public Health
6 Service Public Treatment Guideline does not
7 advise that it is necessary to conduct a DSM
8 diagnosis to determine whether or not treatment
9 should be offered. But if smoking is occurring,
10 the treatment should be offered.

11 Q. Do people that are not addicted or
12 dependent need treatment to stop smoking?

13 A. Well, the question, you said "need", and
14 I'm sorry it is not a simple issue, it is do they
15 need and will they benefit, and those issues are
16 related. We know that people that are offered
17 treatment that are at low levels of cigarette
18 smoking benefit from treatment.

19 This has been shown in analyses by
20 Professor Chris Salagee and others, who have
21 looked at people that have involved in smoking
COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

106

1 cessation trials, some of which only smoke a few
2 cigarettes per day.

3 In practice, those kinds of people are
4 not usually the ones that are studied in trials.

5 However, the data that we do have
6 suggests that those people will benefit.

7 Now, did they need it? Need is a more
8 complicated question.

9 Q. Well, my question was as follows, and
10 I'll restate it, using your benefit: Do smokers
11 who are not addicted or dependent on nicotine
12 benefit from treatment aimed at helping them stop
13 smoking, with respect to their ability to stop
14 smoking? I know that you think they benefit by
15 stopping smoking, because they will avoid the
16 adverse health consequences if they continue to
17 smoke. I'm asking a more narrow question than
18 that. My question is simply whether they will
19 benefit with respect to their ability to stop
20 smoking?

21 A. They may. There are people that may be
COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

107

1 at very low levels of nicotine intake who,

2 nonetheless, would benefit from specific guidance
3 as to how to completely stop smoking. And that
4 guidance may include behavioral strategies,
5 pharmacotherapy or both.

6 Q. Let me see if I understand your position
7 on this. Anybody that smokes on a daily basis
8 has some degree of dependence or addiction,
9 correct?

10 A. That's not what I said.

11 Q. Well, among those that smoke on a daily
12 basis, how can I tell which ones have some degree
13 of dependence or addiction to nicotine and which
14 ones don't?

15 A. If they smoke, on a regular basis, and
16 daily is even more regular, what I am saying is
17 that there is a high probability that they smoke
18 more than one cigarette per day.

19 Q. Wait a minute, I'm sorry,
20 Dr. Henningfield, I have heard this several
21 times. You need to focus on my question. I

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

108

1 don't mean to be rude, but I want us to get done
2 today. I understand the generalities that you
3 believe can be used to draw inferences in
4 general. That's not what I am asking you about.
5 I'm asking you about, if an individual smokes on
6 a daily basis, what else do I need to know to
7 determine whether or not that smoker is one of
8 the smokers that has some degree of dependence or
9 addiction or whether that smoker is one of the
10 smokers that is not exhibiting dependence or
11 addiction?

12 A. Well, you could ask any of the questions
13 in the official diagnostic manual of the DSM.
14 You could ask questions that are used in the FDA
15 approved labeling for when it is appropriate to
16 use treatment medications. You could ask more
17 specific questions that researchers use, like the
18 Fagerstrom, F-A-G-E-R-S-T-R-O-M, tolerance
19 questionnaire items.

20 In other words, there are any number of
21 symptoms and signs that have been scientifically

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

109

1 studied that would provide you with information
2 in addition to the simple observation that they
3 were a daily cigarette smoker.

4 Q. Okay. Let's go back to the affidavit.
5 Working through the affidavit, you were showing
6 to me statements of fact or opinion in this
7 affidavit that you disagreed with.

8 A. Let's see, page two, item six, Part B.
9 He says there is no rational basis for the
10 concept of nicotine addiction assuming that the
11 user of the term is trying to convey a
12 conventionally defined, scientifically based
13 concept.

14 This statement is add odds with every

15 major World Health Organization, the DSM, the
16 ISD-10. It just amazes me that he could make
17 this statement.

18 Q. Help me try to understand this. Your
19 amazement amazes me. Nowhere in the DSM-IV will
20 you find the phrase nicotine addiction; is that
21 correct?

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

110

1 A. The term dependence is the term that is
2 used in the medical literature, but to play a
3 word game and say because DSM and ISD-10 use the
4 word dependence that there is no rational basis
5 for the concept of what anybody in the field
6 knows is simply a broader term for dependence
7 doesn't make any sense.

8 Q. So the answer to my question is that I
9 am correct, that nowhere in DSM-IV will you find
10 the phrase nicotine addiction?

11 A. The DSM uses the technical term, which
12 is dependence, which has been described in
13 numerous places as the technical term for what is
14 more commonly referred to as nicotine addiction,
15 including in the 1988 report of the Surgeon
16 General, which used the word "nicotine addiction"
17 in the title, described the fact that it was used
18 as a more general term for the technical term of
19 dependence, and went forward from there.

20 Q. So the answer to my question is that I
21 am correct, that nowhere in the DSM-IV will you

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

111

1 find the phrase nicotine addiction?

2 MR. GRUENLOH: Objection, asked and
3 answered.

4 MR. FURR: It has been asked. I will
5 agree with that.

6 MR. GRUENLOH: Same objection.

7 A. The word "addiction" is not the term
8 that is used. The concept --

9 Q. I'm not asking about concepts now. Just
10 asking about words.

11 A. Okay.

12 Q. Am I also correct that nowhere in the
13 ISD-10 will you find the word, the phrase
14 nicotine addiction, those words are not there?

15 MR. GRUENLOH: Objection. You have to
16 let him finish his answers, you can't cut him
17 off.

18 MR. FURR: I will let him finish his
19 answer as long as the answer is responsive to the
20 question I am asking. But in an effort to get
21 done today, as I know you both want to, I will

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

112

1 point out to the doctor when he is straying from
2 the answer that is responsive to the question.

3 You remember my last question?
4 A. Yes. The ISD-10 uses the term tobacco
5 dependency as opposed to the other term of
6 nicotine dependence. Neither use the word
7 "addiction."
8 Q. In fact, the World Health Organization
9 in general does not use the term "addiction" any
10 longer; is that correct?
11 A. That's not true. The World Health
12 Organization, the American Medical Association,
13 the National Institute on Drug Abuse, which is
14 our nation's highest authority on addiction and
15 dependence --
16 Q. I'm only asking but the World Health
17 Organization now.
18 A. I answered. I included World Health
19 Organization.
20 Q. That's the problem we're having. I'm
21 not trying to be rude, but when I asked you about
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

113

1 the World Health Organization, and you start
2 talking about something else, it doesn't help
3 anybody here. So if you will try to focus on the
4 question, I'll try to be specific and we can get
5 through this today.
6 Now, once upon a time in the early
7 sixties, the World Health Organization used the
8 term "addiction" in terms of defining certain
9 substances as having either addictive or
10 habituating properties, correct?
11 A. They stopped in the sixties, in 1964.
12 Q. Prior to that, they did use those terms,
13 correct?
14 A. Correct.
15 Q. In 1964, they stopped using the term
16 addiction and habituating, and instead used only
17 the term dependence producing to describe drugs
18 that fell into both the addicting and habituating
19 categories, correct?
20 A. For one specific application, they
21 stopped using the term addiction.
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

114

1 For other applications, the World Health
2 Organization as we sit here today uses the term
3 addiction. You can go to their web site and find
4 it.
5 Q. When do you personally, how do you make
6 the decision when to use the term dependence
7 versus when to use the term addictive, because
8 you use both interchangeably, it seems to me?
9 A. Yes. I think that in general, I use the
10 term addiction in the same way that in general I
11 use the term cancer. It is the term that is most
12 clearly stated and understood. In technical
13 medical writings, I generally use the term
14 dependence. Sometimes I point out the
15 equivalence of the terms or how they will be

16 used.
17 In some writings I will be very specific
18 and explain that nicotine dependence and
19 withdrawal are two specific diagnostic categories
20 that more generally are lumped under the frame of
21 nicotine addiction.

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

115

1 The World Health Organization does
2 basically the same thing, which is why --
3 Q. Excuse me, Dr. Henningfield, again, I'm
4 not being rude, but I want to point out to you
5 was: When you, Dr. Henningfield decide, and you
6 are now telling me something about the World
7 Health Organization. So let's try to focus on
8 the question.

9 Would you agree with me that the
10 definition of the term addiction has changed over
11 time and continues to change today?

12 A. Now, I assume by your question you are
13 doing the same thing that I am doing, you are
14 meaning dependence or addiction, addiction being
15 the more general term, because officially, it is
16 the, again, at the level of the evolution, we are
17 talking about the same concept. If you look in
18 the textbooks, the word is dependence, and I
19 agree that as we obtained new information, the
20 diagnosis, and our precision continues to improve
21 and evolve and that generally the word

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

116

1 dependence, I expect, will continue to be used in
2 medical texts, and that the word addiction will
3 probably continue to be used more broadly.

4 Q. Do you agree with me that the term
5 dependence is a more precise and scientifically
6 defined term than the term addiction?

7 A. Well, by definition, dependence is the
8 word that we use in the official diagnosis.

9 Q. Now, one of the -- strike that. Am I
10 correct that the term addiction is currently used
11 in a very imprecise way by both lay and
12 scientific people?

13 A. Sometimes.

14 Q. For example, both lay and scientific
15 people sometimes describe the process of being
16 addicted to things like exercise or chocolate or
17 video games, correct?

18 A. Correct.

19 Q. And that the imprecision with which
20 people use the term addiction is one of the
21 reasons why scientists tend to use the word

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

117

1 dependence in scientific proceedings, correct?

2 A. Correct.

3 Q. Let's go back to the affidavit, and you

4 were halfway through paragraph 6(A) and you were
5 identifying for me statements of fact or opinions
6 that you don't agree with?

7 A. Let's see, I was on 6(B).

8 Q. Okay. You are correct. 6(B)?

9 A. 6(A) is -- 6(A) it is hard to tell,
10 frankly, what he means, what he seems to mean, I
11 think, he starts off with the statement that
12 tobacco use is a complex psychological and social
13 practice.

14 Now, at that level, a complex
15 biological, psychological and social practice.
16 Now, at that level, I think that any expert in
17 the field would agree with that statement as it
18 pertains to tobacco use, cocaine use or heroin
19 use. It says which cannot be explained in terms
20 of nicotine dependence.

21 Now, if he means nicotine addiction is
COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

118

1 the word he uses, if he means that nicotine
2 addiction is not a factor, I don't agree with
3 that. So I'm not really sure what he means
4 there.

5 Q. Okay.

6 A. Then further on, he talks about some
7 people appear to smoke primarily due to desired
8 physiological effects. I'm not sure if he means
9 by addiction or what he means. Some appear to
10 smoke solely for social reasons.

11 Q. You agree with that.

12 A. I'm not sure how he would ascertain it
13 is solely for social reasons, if they are getting
14 nicotine. I agree that some people's smoking is
15 strongly influenced by social reasons. You know,
16 it depends on if he just means somebody starts
17 smoking for social reasons. It is a
18 hard-to-understand paragraph, quite frankly.

19 On page three, the paragraph, let's see,
20 this is item, I guess, continuing item B,
21 historically the term addiction has been used by

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

119

1 scholars, scientists and researches, clinicians
2 politicians, bureaucrats and lay people to
3 describe a wide variety of concepts. More
4 recently the term dependence has been applied,
5 but this term, too, has been variously used by
6 different people and groups to refer to widely
7 differing concepts.

8 This is another complicated statement
9 where, on one hand, he seems to be conceding that
10 dependence is the more recent technical term for
11 addiction, the implication that he leaves, I
12 disagree with. We might disagree on what his
13 implications are.

14 At one level it is true that, for
15 example, ISD-10 and DSM differ somewhat in their
16 criteria, and that DSM-IV is an evolution from

17 DSM III-R, but the implication, he seems to
18 imply, he uses the phrase "widely differing."
19 I think when it comes to experts in the
20 area, there is a considerable degree of consensus
21 on how the terms are used, and this is evidenced
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

120

1 by the consistency, the general consistencies of
2 the ISD-10 with the APA and, in turn, with the
3 U.S. Public Health Service Clinical Practice
4 Guidelines, so the fact that he can go through
5 the literature and find various statements is
6 different from, frankly, the enormous consistency
7 in the field of experts as to how they use these
8 terms.

9 Q. In those terms with respect to the field
10 of experts, are you a member of the American
11 Society of Addiction Medicine?

12 A. No.

13 Q. All right. Let's keep going.

14 A. As noted above the term addiction is no
15 longer used in legitimate medical and scientific
16 community for purposes of diagnosis.

17 At one level, I agree with the fact that
18 the term that you would use in the medical record
19 would be dependence. But the fact is that any
20 number of legitimate medical and scientific
21 communities, such as the Mayo Clinic in

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

121

1 Minnesota, researchers at the National Institute
2 on Drug Abuse that on a daily basis routinely use
3 the term addiction, so if all he means is what
4 you write in the chart, for an official DSM,
5 that's correct.

6 If he means that it is no longer used in
7 legitimate medical and scientific communities, I
8 don't know where he has been living.

9 Q. Your point, as I understand it there, is
10 that physicians and other researchers also tend
11 to sort of loosely use interchangeably the terms
12 addiction and dependence?

13 A. Yes.

14 Q. What is your next point of disagreement?

15 A. Well, the next line is confusing,
16 because he seems to be disagreeing with himself.
17 He says traditionally clinicians have used
18 addiction to refer to a specific syndrome of
19 intoxication intolerance, et cetera.

20 Now, I don't know if he means that -- I
21 don't know if he means that addiction is okay,

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

122

1 and it is traditional, if you are referring to
2 intoxication. I don't know what he means there.

3 Either he is disagreeing with himself,
4 or if he is using the word interchangeably with

5 dependence, then I don't know where he has been
6 getting his information that intoxication is part
7 of the criteria.

8 Q. Let me ask you this question.

9 A. For dependence.

10 Q. If we substituted the word historically
11 for traditionally in that sentence, would it be a
12 more accurate statement?

13 A. It might, depending how far back in
14 history you went, because the first symptom he
15 lists in the syndrome is intoxication, and you
16 have to go back to the 1950's to find that listed
17 as part of the symptom for dependence or what was
18 historically referred to as addiction.

19 Q. Dr. Henningfield, that's not a correct
20 statement. The Surgeon General was still listing
21 intoxication as one of the criteria for addiction

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

123

1 in 1964.

2 A. The 1964 Surgeon General's Report used
3 criteria from the 1950's World Health
4 Organization Expert Committee. In that same year
5 in 1964 the World Health Organization made it
6 clear that intoxication was not a criteria for
7 dependence.

8 Q. But when the '64 report was published,
9 the Surgeon General still listed intoxication as
10 one of the criteria for dependence, for
11 addiction?

12 A. Factually what you said is true, we can
13 go back 46 years and find that that word was used
14 based on 1950's criteria from WHO.

15 The point is it is a long time ago.

16 Q. Okay. Hopefully we're past the
17 traditional sentence now. What is your next
18 point of disagreement?

19 A. Number E, in order to determine whether
20 a given individual is dependent upon a given
21 substance, it is necessary that a licensed

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

124

1 psychologist or psychiatrist (extensively trained
2 in mental health assessment) conduct a specific
3 evaluation of that person using established
4 criteria, and basing the diagnosis upon the
5 clinical significance of the behaviors in
6 question and upon ruling out other medical or
7 psychiatric factors which account for the
8 behaviors.

9 Now, as this stands, it is hard to
10 evaluate it. If all he means is to be paid for a
11 service that requires that that diagnosis be
12 conducted, as he has described it, then that's
13 true. He has not qualified this, that he means
14 this is only to be for him to be reimbursed for a
15 service.

16 So I think it is reasonable to assume,
17 since he hasn't qualified it, that he means that

18 you can't tell if an individual is dependent
19 unless all of this is done by a licensed
20 psychologist or a psychiatrist. And that flat
21 out is at odds with the Clinical Practice

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

125

1 Guideline that was listed in 1976 by the U.S.
2 Agency for Health Care Policy Research and
3 updated this past June and released by the U.S.
4 Public Health Service.

5 Q. Okay.

6 A. So he is way out on a limb there.

7 Q. Let me ask you specifically about the
8 statement F on the top of page four regarding
9 nicotine dependence. A diagnosis of such a
10 condition would have no predictive value
11 whatsoever, in determining whether or not a
12 motivated individual would or would not choose to
13 quit smoking. Is that a correct statement?

14 A. Is it a statement that he wrote or what
15 was the question?

16 Q. Is that an accurate statement?

17 A. That is a ridiculous statement.

18 Q. Tell me why.

19 A. Anybody that is familiar with clinical
20 trials that have been conducted on smoking
21 cessation can see that one of the most important

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

126

1 factors is number of cigarettes, one of the most
2 important factors in determining outcome is the
3 level of dependence, as inferred from either
4 objective biological markers such as plasma
5 nicotine or codamine level or carbon monoxide
6 level which are associated with nicotine intake
7 or indices such as the Fagerstrom questionnaire
8 items, or even relatively crude markers such as
9 the number of cigarettes smoked per day.

10 Now, another factor is also the
11 motivation that is demonstrated, but to make this
12 statement "has no predictive power whatsoever" is
13 so at odds with the world literature that it is
14 what led to my earlier comment questioning his
15 expertise.

16 Q. Let me ask you the question this way,
17 and you began to answer this in part, I think:
18 What factors are most predictive with respect to
19 whether a current smoker will become an
20 ex-smoker?

21 A. The first factor is pretty obvious,

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

127

1 whether or not the person is trying to quit
2 smoking, and there are many dependent individuals
3 that, at any given point, are not trying to quit
4 smoking, and spontaneous cessation, what is
5 sometimes called spontaneous remission, which is

6 people just out of nowhere, for no apparent
7 reason, stopping, is rare.
8 So the first condition is the same as we
9 see for any addictive drug. The person is
10 motivated enough to try to quit.
11 Beyond that, factors such as treatment
12 resources, social and/or professional support and
13 specific treatments are important for all
14 addictions. And for all addictions, the level of
15 dependence can be a factor; but in any give
16 study, the level of dependence, depending on how
17 it was assessed, may or may not have proven
18 statistically significant.
19 In the case of tobacco, there is a
20 stronger relationship between objective factors
21 such as number of cigarettes per day, plasma

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

128

1 levels of nicotine and treatment outcome.
2 Q. Am I correct that the factor that is
3 most predictive of whether a smoker will become
4 an ex-smoker is whether they are motivated and
5 attempt to quit?
6 A. By definition if they don't attempt to
7 quit, they are extremely unlikely, so at one
8 level, the level of motivation is generally
9 regarded as an important factor for all
10 addictions.
11 At another level, by definition,
12 quitting doesn't occur, unless there is some
13 level there.
14 Q. I should have said level of motivation.
15 I understand they don't become ex-smokers without
16 attempting to quit. But am I correct that the
17 level of motivation is the factor that is most
18 predictive of whether a smoker will become an
19 ex-smoker?
20 A. Say that once more, please.
21 Q. Am I correct that the level of
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

129

1 motivation to quit is the factor that is most
2 predictive of whether a smoker will become an
3 ex-smoker?
4 A. In some studies, it isn't even assessed.
5 In a lot of studies that have looked at
6 motivation, especially some of the older studies,
7 they didn't have an objective way of looking at
8 nicotine dependence, so to find that motivation
9 wasn't a factor when they didn't have a way of
10 looking at nicotine dependence, I'm not sure how
11 meaningful the outcome of those studies are.
12 In the last approximately 15 to 20
13 years, where we now have the benefit of dozens
14 and dozens of objectively run multi-center
15 clinical trials, where people were diagnosed, and
16 where biological markers of nicotine intake were
17 collected, one of the most important outcome
18 factors is level of dependence, as inferred from

19 biological exposure, proxy measures, such as the
20 Fagerstrom tolerance questionnaire items, or
21 cigarettes per day.

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

130

1 MR. FURR: Okay. Let's go off the
2 record.

3 (Break.)

4 (Lunch.)

5 Q. Okay. Ready? Dr. Henningfield, let me
6 hand you what we have marked as your Deposition
7 Exhibit 7 and have you review that and verify for
8 us that that is a copy of your expert disclosure
9 in this case.

10 (Whereupon, Henningfield Deposition
11 Exhibit No. 7, expert disclosure, marked.)

12 A. Yes. It is.

13 Q. I want to ask you some questions about
14 it. You see the heading subject matter and
15 anticipated testimony on the first page?

16 A. Yes.

17 Q. It states Dr. Henningfield will testify
18 the defendants control of nicotine levels and
19 delivery and will describe the various cigarette
20 design methods relevant to such control.

21 What do you anticipate your testimony to
COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

131

1 be regarding defendants' control of nicotine
2 levels and delivery?

3 A. Working from the general to the more
4 specific, at the general, that levels of nicotine
5 in the cigarette and yield from the cigarette to
6 a machine and delivery to a cigarette smoker are
7 controlled.

8 And they are controlled through a
9 variety of physical and chemical and you can
10 consider chemical physical obviously, but I'm
11 differentiating between physical design
12 characteristics and chemical means of control.

13 Q. Okay. What are the physical means by
14 which the defendants, in your opinion, control
15 the nicotine levels and delivery in their
16 products?

17 A. These include a number of features, a
18 prominent one being the amount of tobacco that is
19 in the cigarette, the ventilation that is used in
20 the cigarette, the paper and filter, the porosity
21 of the paper, filter overwrap which may cover

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

132

1 some of the tobacco in the cigarette.

2 Those are the major physical design
3 elements that I would anticipate talking about.

4 Q. Okay. What is the basis for your
5 testimony regarding the physical design elements
6 through which defendants, in your opinion,

7 controlled the nicotine in their cigarettes and
8 the smoke?
9 A. Do you mean what would I say? You said
10 what is the basis?
11 Q. Right. What are you basing your
12 testimony on in that regard?
13 A. My own physical examination of
14 cigarettes and my review of the published
15 literature over the last approximately two
16 decades and on tobacco industry documents that
17 have described these elements of cigarette design
18 and manufacture.
19 Q. What tobacco industry documents are you
20 relying on?
21 A. I don't have a list in front of me, but
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

133

1 they would be among those that I relied upon for
2 the Washington State Attorney General's trial in
3 1998, and could rely upon others that have been
4 disclosed that are accepted between the
5 plaintiffs and the defendants in this case.
6 What I mean by that is: I see new
7 documents quite frequently. Some of them are
8 interesting. I have not seen any that changed,
9 in the last two years, that changed my opinions,
10 that I was issuing in the Washington case, and so
11 if it was determined that I was restricted to
12 those, that would be fine.
13 Q. Okay. Can you identify for me the R.J.
14 Reynolds documents that you would rely upon as a
15 basis for your opinions about the physical
16 techniques by which Reynolds has controlled the
17 nicotine in its cigarettes and the yield in
18 cigarette smoke?
19 A. I can. I do not have a listing in front
20 of me.
21 Q. Can you identify for me the documents
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

134

1 that you rely on for that proposition from Philip
2 Morris?
3 A. And I can, but I do not have the listing
4 in front of me.
5 Q. Can you identify me those documents for
6 Lorillard?
7 A. I can, but I do not have the listing in
8 front of me.
9 Q. Can you identify for me those documents
10 for B & W?
11 A. I can, but I do not have the documents
12 in front of me.
13 Q. Do you have a list of those documents in
14 front of you?
15 A. No. I do not.
16 Q. Do you have a list of those documents in
17 your files somewhere?
18 A. I have documents in a variety of files.
19 I would have to spend some time putting together

20 a new listing. I can do that.
21 Q. I will ask that you do that, that you
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

135

1 put together a list of the documents that you
2 rely upon from the company's files, both for this
3 issue and for any other issues that you are
4 prepared to offer opinions on, and that you
5 provide that list to Mr. Gruenloh. Are you
6 willing to do that?

7 A. Yes.

8 Q. What I will ask you on the record is
9 that you provide it to us, and that we are
10 provided an opportunity to question
11 Dr. Henningfield about those documents and the
12 manner in which he relies upon them as I think we
13 we are entitled to do.

14 MR. GRUENLOH: The list of documents is
15 the same list of reliance materials provided in
16 the Washington AG case. We have indicated in the
17 past that the reliance materials for experts such
18 as Dr. Henningfield, experts whose opinions have
19 not significantly changed for this case are the
20 same as that list. If that list is any
21 different, then you should be entitled to ask
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

136

1 questions about those specific documents.
2 MR. FURR: Well, the fact that he may or
3 may not have been asked some questions in the
4 past about documents that may or may not be the
5 documents that he is currently relying upon does
6 not in any way undermine my right to know which
7 documents he is relying on in this case, to have
8 him identify for me those documents, to have him
9 explain to me how those documents support his
10 opinions, so that I can ask him questions about
11 it. And that's going to be my position, and I
12 think that others may want to comment on this.

13 MR. GRUENLOH: If I could, before you
14 do, Bill, the only point I'm making is that I
15 think that you were on notice prior to this
16 deposition, of Dr. Henningfield's reliance
17 materials, because we indicated in the past and
18 all along, that our position is that those
19 reliance materials are the same as the reliance
20 materials in this case. That's all I'm saying.

21 MR. NEWBOLD: I'm Bill Newbold. I
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

137

1 represent Lorillard Tobacco Company. I will
2 adopt the comments made by Jeff Furr and add to
3 that, as I sit here, I'm not sure whether or not
4 we were on notice, whether we were told what
5 documents he was going to rely upon in the
6 Washington case.

7 Even if we were, it makes no difference,

8 because this is a medical monitoring case in West
9 Virginia, this is the first medical monitoring
10 case to be tried in the State of West Virginia
11 under specific West Virginia laws.

12 Dr. Henningfield has been hired to give
13 specific opinions and obviously he will give
14 specific opinions about specific companies
15 relying upon specific documents in this case, and
16 we have a right to know what are the documents,
17 we have the right to question him about the
18 opinions and the to test the opinions. I will go
19 on the record right now as telling you that when
20 we receive this list of what he has relied upon
21 in forming his opinions, that we will be asking

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

138

1 the court for a second day of deposition of
2 Dr. Henningfield.

3 MR. GRUENLOH: Before we go on, I would
4 point out at the end of Dr. Henningfield's
5 disclosure, it does state that he has previously
6 stated his opinions on these matters in his
7 depositions and trial testimony in the State of
8 Washington versus Philip Morris, videotape sworn
9 testimony in the State of Florida and his prior
10 testimony and those opinions are incorporated
11 herein by reference. So I think that you are on
12 notice that the reliance materials were the same.

13 MR. NEWBOLD: The disclosure that you
14 read from says absolutely nothing about whether
15 the documents upon which he is relying in this
16 case are the same documents upon which he relied
17 in the Washington case. It goes on to say he may
18 review additional documents produced by the
19 defendants, and plaintiff reserves the right to
20 supplement his disclosure, so that in both cases,
21 I stand on what I said before, this document did

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

139

1 not put us on notice that his opinions would be
2 based upon the documents that he relied upon in
3 Washington, and it further goes on to say that he
4 may review additional documents that may be
5 produced in the future, and I simply restate the
6 fact that we will be asking for additional time
7 in which to question Dr. Henningfield.

8 MR. FURR: Anyone else?

9 MR. KLEIN: We join.

10 MR. WOOLSON: We join.

11 MR. FURR: Anybody on the phone for B&W?

12 MS. CALLAS: Yes, this is Gretchen
13 Callas. We also join in that objection.

14 Q. All right, Dr. Henningfield. Identify
15 for me, if you would, the published literature
16 which you reviewed and upon which you rely for
17 the opinions you have about the manner in which
18 the defendants have physically controlled the
19 amount of nicotine in their cigarettes and the
20 smoke yield of nicotine?

21 A. The public literature, the major
 COURT REPORTING CONCEPTS, INC.
 Baltimore, Maryland
 Phone (410) 821-4888 Fax (410) 821-4889

140

1 document is that proposed rule by the Food and
2 Drug Administration from August, 1995, and the
3 final rule issued by the Food and Drug
4 Administration on tobacco in August of 1996, is
5 probably one of the most comprehensive single
6 publicly available documents or set of documents.

7 There are other public literature
8 documents, such as Colin Browne, B-R-O-W-N-E, his
9 monographs, I believe the most recent one was in
10 1990, which describes various elements of
11 cigarette design and delivery control.

12 The documents or the published
13 literature from scientists at the American Health
14 Foundation, generally under the Dietrich Hoffman
15 group, which have analyzed and described various
16 elements of cigarette dosage control, design.

17 Descriptions of cigarette design and
18 dosage control by Drs. William Rickert
19 R-I-C-K-E-R-T and John Slade, S-L-A-D-E. And I
20 believe I previously listed the documents from
21 the Action Office on Smoking and Health of the

 COURT REPORTING CONCEPTS, INC.
 Baltimore, Maryland

 Phone (410) 821-4888 Fax (410) 821-4889

141

1 United Kingdom and their analyses of cigarette
2 dosage control and design. These are primary
3 documents.

4 As I mentioned earlier, I follow the
5 literature virtually every day of the week, I
6 read something in the tobacco literature, which
7 gives me additional insights, but those are some
8 of the literature that I consider extremely
9 useful and publicly available.

10 Q. Which documents by Dietrich Hoffman and
11 the American Health Foundation do you rely upon?

12 A. One of the documents that provides a
13 nice summary of a lot of additional materials, is
14 the 1997 review by Hoffman and Hoffman, Dietrich
15 and Yolsa Hoffman, on cigarette design, I do not
16 recall the title of the review article, but it is
17 a major review article.

18 Q. Who is -- I'm sorry, go ahead.

19 A. That document in turn refers to more
20 specific studies that he and his colleagues have
21 conducted.

 COURT REPORTING CONCEPTS, INC.

 Baltimore, Maryland

 Phone (410) 821-4888 Fax (410) 821-4889

142

1 Q. Which documents by Dr. Slade are you
2 relying upon?

3 A. His 19, I believe, 1993 review of
4 cigarette design in the textbook that is edited
5 by Tracey Orleans and John Slade on cigarette
6 design, and, as well, frankly, as the paper that
7 I co-authored by Dr. Slade, Slade and
8 Henningfield, The Food and Drug Law Institute,

9 1988.
10 Q. Which documents from the United Kingdom
11 Action Office on Smoking and Health are you
12 relying on?
13 A. They have a document on light
14 cigarettes, and I do not recall the title, but I
15 believe it is the only, I believe there is only
16 one document that has the word "light cigarettes"
17 in the title. I believe the publication was
18 1998.
19 Q. Tell me about this physical examination
20 of cigarette products that you have conducted
21 yourself.

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

143

1 A. I have taken cigarettes apart, dissected
2 them, if you will, to examine them for physical
3 design characteristics that might be evident upon
4 such inspection, such as the placement of tobacco
5 filter overwrap, placement of the ventilation
6 holes in the filter and the filter paper. And I
7 conducted such a dissection in the Washington
8 State trial, which is on record.

9 Q. What specific tobacco brand styles have
10 you physically examined?

11 A. Boy, I have looked at dozens of them
12 over the years. Certainly there is a Marlboro
13 and Marlboro Light and Carlton and Winston and
14 Camel, Parliament, Newport, True, Basic -- when I
15 say the brands, each brand has a whole family,
16 and I don't remember which cigarettes in the
17 family, hard pack, soft pack, so forth. This is
18 not inclusive, but all of the brands I just
19 mentioned are ones that come to mind.

20 Q. When did you perform those examinations?

21 A. Over the past several years.

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

144

1 Q. When did you begin examining cigarette
2 products?

3 A. I do remember an even more crude level
4 than I am describing, I guess in the late 1970's,
5 but frankly didn't know a lot what to look for at
6 that time, but I did some physical examinations
7 for the purposes of research that I was doing at
8 the Johns Hopkins Medical School.

9 And I guess the most recent examinations
10 have been right up within the last couple of
11 months. I don't have dates at which these were
12 conducted, but this has been a fairly regular
13 activity, to look at brands and look at some of
14 the new brands that come on the market and
15 examine them.

16 Q. Why do you perform such examinations?

17 A. To see if there are things that might be
18 visibly obvious that might be relevant to the
19 dosing control or the means of dosing control of
20 the cigarettes.

21 Q. Describe for me your background and

1 training that you have received in how to examine
2 physically cigarette products to evaluate the
3 manner in which dose is being controlled of
4 nicotine and delivery from those cigarettes.

5 A. It is a lot of different sources of
6 information. My formal training is in psycho
7 pharmacology, a major element of which is the
8 importance of dosage control.

9 So that provides a general basis of
10 knowledge for the importance of dosage control
11 with drugs in general.

12 We move from there to cigarettes, where,
13 in 1978, when I was specifically hired as a
14 faculty member at Johns Hopkins Medical School to
15 become more expert in cigarette design, in
16 particular, and at that time, sources of
17 information included materials ranging from the
18 Tobacco Reporter which would describe various
19 elements of tobacco manufacture and design, to
20 literature that at that time I received from the
21 office On Smoking and Health at the Centers for

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

1 Disease Control.

2 In the early eighties I was working with
3 people in the Office on Smoking and Health at the
4 Centers for Disease Control, who had expertise, I
5 don't know what the source of their expertise
6 was, but staff who would also discuss and explain
7 different elements of dosage control.

8 The National Cancer Institute issued
9 monographs as part of the product of its program
10 of studying alternative cigarette designs in the
11 1970's. This was a source of information.

12 Later in the 1980s, other professionals
13 in the field, including Len Koslowski, John
14 Slade, people from the Addiction Research
15 Foundation in Toronto, including Len Koslowski,
16 such as Dr. Richard Precker.

17 I'm not sure at what point I met and
18 spoke to Dr. William Rickert, who was another
19 authority on cigarette design.

20 So this is not comprehensive, but you
21 asked me what I learned and what is the basis,

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

1 these are some of the people that provided
2 guidance and some of the sources of literature
3 and formal sources of information.

4 Q. Do I understand that one of the sources
5 of information that you have reviewed are the
6 monographs issued by the National Cancer
7 Institute's Tobacco Working Group?

8 A. Correct.

9 Q. Let's go back to what it is you are

10 prepared to say about the dosage control through
11 these physical techniques that you have
12 described.

13 What are the opinions that you are
14 prepared to express in that regard?

15 A. The first baseline opinion is that
16 nicotine dosing capacity of a cigarette is not
17 simply an inadvertent effect of how much nicotine
18 happens to be contained in the tobacco that is
19 used to manufacture the cigarette, but that
20 nicotine itself is highly controlled, and I
21 concur with the opinion of the Food and Drug

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

148

1 Administration which concluded that the nicotine
2 dosage control was well within the range of that
3 that they expect in pharmaceutical products.

4 The second major category of opinion is
5 that the dosage control is an element of
6 cigarette design that is integrated with
7 cigarette marketing, such that, in cigarette
8 advertising and other marketing techniques,
9 claims can be made, such as lower levels of tar
10 and nicotine or reduced tar and nicotine or
11 labeled such as "light" while also making the
12 claim that people do not have to sacrifice taste,
13 flavor or satisfaction, where these words or
14 other various words are used, and that the
15 nicotine dosage control in the cigarettes is
16 integral to that marketing effort.

17 Those are the two -- well, I guess the
18 third one that follows from that is the fact that
19 the advertised nicotine delivery or yield ratings
20 are misleading to consumers, and that these
21 various aspects of cigarette design and

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

149

1 manufacture are part of the basis for the fact
2 that the advertised ratings are misleading.

3 Those are the three major elements that
4 I discussed in the Washington State trial and
5 that I would anticipate discussing again in this
6 trial.

7 Q. Let me ask you about the first. If you
8 are correct, that nicotine dosing capacity is
9 controlled through a number of design elements,
10 is there something that you find to be
11 inappropriate about that?

12 A. It depends on the context. If the
13 context is that the manufacturers are claiming,
14 as they have at various times in the past, that
15 nicotine is a natural part of the tobacco product
16 and is, therefore, as part of its natural
17 occurrence in the plant, then I see no reason
18 that it would be manipulated so exquisitely, or
19 if when it was removed in the process of making
20 reconstituted tobacco, for example, that it would
21 be put back with such precision.

COURT REPORTING CONCEPTS, INC.

1 Now, if the tobacco companies are
2 sticking with the more recently articulated
3 positions, such as the Philip Morris web site
4 that admits that nicotine is addicting, then such
5 dosage control would be expected but not
6 necessarily something that is desirable to public
7 health.

8 Q. Let's take care of the easy issues
9 first. You and I are not going to have to debate
10 long, I hope, about whether or not nicotine is a
11 natural part of the tobacco plant, correct?

12 A. No, depending upon what your position
13 is.

14 Q. Nicotine is a natural occurring alkaloid
15 in the tobacco plant, correct?

16 A. Correct.

17 Q. It is not something that the cigarette
18 manufacturers put there. It is a natural
19 alkaloid that occurs when the tobacco plant
20 grows, correct?

21 A. Well, cigarette manufacturers put it in
COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

1 the cigarette when they remove it.

2 Q. I'm just talking about the plant now. If
3 you will try to focus on the question, I'll do my
4 best to get as far as I can today. I understand
5 you have a lot of opinions. I want to hear them
6 all. I want to hear them when they match the
7 question I ask.

8 A. Yes. You said there, and I should have
9 asked you what you meant by there.

10 Q. Now, help me understand what it is you
11 find to be inappropriate about the cigarette
12 manufacturers manufacturing a product that has a
13 consistent yield of nicotine under FTC
14 conditions?

15 A. That's not what I said.

16 Q. Do you find that to be inappropriate?

17 A. Do I find it to be inappropriate that
18 they would maintain consistency?

19 Q. Yes.

20 A. Not necessarily.

21 Q. Explain to me what you find to be
COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

1 inappropriate about cigarette manufacturers
2 controlling the nicotine dosing capacity of
3 cigarettes.

4 A. It is controlled in such a manner as to
5 deceive consumers, and that, I believe, is
6 inappropriate.

7 Q. Do you believe that cigarette
8 manufacturers intentionally controlled the
9 delivery of nicotine in their products in a
10 manner to deceive consumers?

11 A. Yes.
12 Q. What's your basis for that belief?
13 A. Well, for example, in the case of the
14 ventilation holes, they frequently hide the
15 ventilation holes, and the manufacturer
16 understands, and is on record for understanding
17 that to achieve the level of nicotine yield that
18 is advertised, those holes cannot be blocked, yet
19 they are, in many cigarette brands, deliberately
20 placed in such a way that they are virtually
21 invisible and placed in such a way that it is
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

153

1 almost unavoidable that at least some of the time
2 they will be blocked.

3 Q. What's the basis for your belief that
4 the manufacturers hide the ventilation holes or
5 deliberately place them in a way that they are
6 virtually invisible?

7 A. Well, for example, I can remember
8 Tobacco Reporter advertisements for ventilation
9 technology, which advertised that they could make
10 them so they were visible or invisible; and, in
11 fact, on many brands, they are extremely
12 difficult to see. And if this is an integral
13 part of the operation that they not be covered,
14 then it doesn't make any sense that they would be
15 made invisible or there would not be some
16 guidance to consumers.

17 Q. Who issued these advertisements in the
18 Tobacco Reporter claiming they could make
19 ventilation holes invisible or visible?

20 A. I don't remember which companies that I
21 saw, but that is not the only -- the main basis
COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

154

1 for my opinion is the evidence of the cigarettes
2 themselves that are presently on the market. I
3 just mentioned that it was quite a while ago that
4 it was brought to my attention reading Tobacco
5 Reporter.

6 Q. I'm not going to disagree with you about
7 some products have ventilation holes and they can
8 sometimes be difficult to see.

9 What I want to know is your basis for
10 believing that that circumstance is a result of a
11 deliberate attempt by cigarette manufacturers to
12 mislead consumers.

13 A. Well, here the physical evidence is
14 supplemented by documents, such as those, and I'm
15 paraphrasing, which state that, I recall one
16 document talking about the importance of finding
17 means to circumvent the testing apparatus that
18 quote do not invite obvious criticism. Another
19 document --

20 Q. Excuse me. Let me ask you about that.
21 Whose is that?

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland

1 A. It might be Brown & Williamson, but it
2 could be most of the major companies that I have
3 seen. I'm saying most, because I do not have a
4 document from every single company. But at least
5 documents representing Brown & Williamson, in
6 come cases its parent or affiliate, British
7 American Tobacco, Philip Morris, I believe
8 Liggett, R.J. Reynolds, which have similar kinds
9 of statements.

10 Q. For each company, I want you to list for
11 me the documents that you rely upon for the
12 proposition that the companies have deliberately
13 misled consumers through the utilization of
14 ventilation hole technology and I would like to
15 know who wrote the document, when it was written,
16 who the document was sent to and how that
17 document was utilized by the company.

18 A. Now, you misstated something I said,
19 which is attributing all of the documents and all
20 of the techniques to ventilation hole technology.

21 Q. That's the only one I'm asking you about
COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

1 now.

2 A. Okay.

3 Q. We have been talking about ventilation
4 hole technology and you have told me in part you
5 are relying upon the documents, and I want to
6 know for each company which documents you relied
7 upon, who wrote them, when they received them,
8 and how they were utilized in the company.

9 A. Okay.

10 Q. Can you do that?

11 A. Sure.

12 Q. Go ahead.

13 A. Oh, not offhand. I can prepare it for
14 you.

15 Q. Will you do that?

16 A. Sure, be happy to.

17 Q. I don't want to belabor this all day,
18 but what I want to ask you to do is to provide a
19 list to Mr. Gruenloh of all of the company
20 documents for each company, for each issue, that
21 you rely upon as a basis for your opinions?

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

1 A. I will work with Mr. Gruenloh and his
2 staff to compile such a list.

3 MR. NEWBOLD: I would like to put this
4 on the record, and that is the notice of
5 deposition that was served on plaintiffs and on
6 Dr. Henningfield required that he bring with him
7 any and all documents that he relied upon or
8 reviewed in forming the opinions that he would
9 render in this case.

10 Any and all documents in his possession
11 which support or relate to the opinions that he

12 would render in this case.

13 He has not brought any of those
14 documents with him. In response to questions by
15 Mr. Furr about documents, he says he doesn't have
16 them. He doesn't even have a list of what they
17 are.

18 This is highly improper and makes it
19 impossible for us to conduct a proper examination
20 of Dr. Henningfield to explore the basis of his
21 opinions.

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

158

1 MR. GRUENLOH: I think those comments
2 were at least in part incorrect.
3 Dr. Henningfield did bring two documents which
4 are new to his analysis and specific to his
5 analysis to West Virginia. And I think this goes
6 back to the issue that the reliance materials for
7 this case are the same as the reliance materials
8 that he has relied upon in the Washington and the
9 Florida case, and as I stated before, I think you
10 are on notice as to those documents. But I guess
11 we'll have to agree to disagree on this point.

12 MR. NEWBOLD: That's a very interesting
13 comment, but the notice says you are further
14 notified that the defendants are requesting that
15 the deponent identified herein, Dr. Henningfield,
16 bring with and produce at their depositions the
17 documents described in the schedule of documents
18 attached hereto as notice Exhibit A, and I read
19 through those earlier, and Dr. Henningfield shows
20 up today with two pieces of paper and doesn't
21 have any documents upon which he is basing his

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

159

1 opinions today and that is highly inappropriate.

2 MR. FURR: Here is part of the problem,
3 Mike. If you had called me and said what you
4 said today and that he wasn't going to bring any
5 of those documents with him, but if I wanted to
6 ask any questions about them, I would have to
7 bring them with me, then I would have known to do
8 that. But not having heard an objection from
9 you, with respect to the request made in our
10 document request, I think we had the right to
11 assume that he would bring such documents with
12 him.

13 MR. GRUENLOH: The only problem I have
14 with that, Jeff, is this is the way we handled it
15 in Dr. Burns' deposition, this is the way we
16 handled it in Dr. Benowitz deposition, and this
17 is the way we handled it in Dr. Ferone's
18 depositions. There was correspondence in those
19 depositions. I apologize we did not send you
20 explicit correspondence setting out that would be
21 the way we would be handling it in this

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

1 deposition as well. I thought that point had
2 been gone over and belabored enough.

3 MR. FURR: When you made those points
4 for Dr. Benowitz and Dr. Burns, we did not raise
5 this issue we are raising today, because we had
6 the information we needed to make conscious
7 choices about what documents to bring with us.
8 But having established that pattern of conduct
9 and then not acting in the same manner with
10 respect to this witness, the obvious
11 interpretation for me, and I submit the only
12 interpretation to be made, was that he was going
13 to bring his documents with him. And having not
14 done so, we are put in a position where we can't
15 fairly probe his opinions. I'm not accusing you
16 of doing it intentionally. I want you to
17 understand the reasoning and maybe having heard
18 that, you will agree that since we are not going
19 to finish today anyway, in all likelihood, that
20 the fairest thing to do is for you and
21 Dr. Henningfield to undertake, as he has

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

1 volunteered to do, to develop the list of
2 documents that we have requested and provide it
3 to us in a manner that will allow us to hopefully
4 effectively and expeditiously proceed to examine
5 him on the document-based portion of his
6 opinions.

7 MR. GRUENLOH: I'm not going to agree to
8 that here. Because from what we did at the prior
9 depositions there was a clear course of
10 procedure. I would also point out that you are
11 quoting the schedule of documents that the
12 defendants made of us like it is a ruling the
13 court has issued. That was a request you made of
14 us, we were under no obligation to do that. It
15 would be interesting to see in the depositions
16 that are coming up in the next two or three
17 weeks, with all of your experts, if you do the
18 same.

19 But as we sit here today, I'm not
20 willing to agree to that.

21 MR. FURR: I think the facts are on the
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

1 record.

2 MR. GRUENLOH: Yes, I do, too.

3 Q. All right, Dr. Henningfield. Let's go
4 now.

5 MR. LONG: Mr. Furr, may I inquire on
6 that issue, when we can expect your expert
7 report?

8 MR. FURR: We will be glad to discuss
9 this in a manner that doesn't disrupt this
10 deposition at the end of the day.

11 Q. Dr. Henningfield, identify for me now,
12 please, the chemical techniques that you believe

13 that the cigarette manufacturers have used to
14 control the nicotine dosage in their products in
15 smoke?

16 A. There are a variety; and I will list
17 them not necessarily in order of prominence.

18 The first is the inclusion of
19 reconstituted tobacco or sheath material that has
20 been stripped of much of its nicotine with
21 nicotine and other substances.

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

163

1 That treatment can also include
2 substances such as glycerin, that can maintain
3 moisture and affect the ultimate yield of
4 nicotine from the burned cigarette.

5 Substances such as glycerin can also be
6 added to tobacco leaf and tobacco material that
7 has been cut to affect moisture and other aspects
8 of burning and, in turn, affect dosage control.

9 Burn accelerants are used in the paper
10 not only to maintain the -- not only to keep the
11 cigarette from spontaneously extinguishing, but
12 also to influence the burn rate, which is another
13 means by which the nicotine yield determined by a
14 smoking machine will be controlled.

15 Additives such as sugars can be added in
16 such a manner that chemicals such as acetaldehyde
17 can be formed which can interact with the effects
18 of nicotine.

19 Ammonia compounds have been described
20 extensively in tobacco industry documents as a
21 means of controlling nicotine yield and/or

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

164

1 availability as well as other aspects of
2 cigarette pharmacology and the sensory effects.

3 These are some of the prominent ones
4 that I think are important to call attention to
5 and that have been discussed in detail in tobacco
6 industry documents and have been reviewed by the
7 U.S. Food and Drug Administration.

8 Q. Let me start with the use of ammonia
9 compounds that you say has been extensively
10 documented in tobacco industry documents.

11 Can you identify which documents you
12 relied upon for that proposition for each of the
13 cigarette manufacturers that are defendants in
14 this case?

15 A. Yes. But I do not have them with me.

16 Q. So as you sit here today, you are unable
17 to identify for me the title, date, author,
18 recipients or specific language contained in any
19 of those documents, correct?

20 A. I can tell you that all of those that I
21 would need to rely upon for this case have been

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

165

1 disclosed.
2 Q. That's not my question.
3 A. Well, you have interrupted me.
4 Q. I want you to try to answer the question
5 I'm asking. I know about this, your belief that
6 I should have gone through the Washington
7 transcript or something like that and tried to
8 determine what documents you relied on. I
9 understand that. That's not my question.
10 My question is: As you sit here today,
11 can you identify for me, for each company, which
12 documents you are relying upon as a basis for
13 your opinion regarding the use of ammonia by
14 identifying either the title of the document, the
15 author, the date, the recipient or the specific
16 language contained in the document.
17 MR. GRUENLOH: If you want to testify on
18 behalf of Dr. Pen Henningfield you we can just
19 leave. But if you want to let him answer, maybe
20 we can see what he is saying.
21 MR. FURR: Go ahead and answer.
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

166

1 A. I already provided specific lists and
2 names for numerous depositions and trial to the
3 then tobacco industry depositions. I don't have
4 them with me today.
5 Q. Tell me something. When you read the
6 schedule of documents that you said was sent to
7 you -- by the way, who sent it to you?
8 A. When I read what?
9 Q. The schedule of documents that was
10 attached to your deposition notice. You told me
11 that someone sent you the schedule of deposition
12 documents?
13 A. This was sent to me, and the fax time
14 and date are on the document, and it was from the
15 offices of Ness Motley, I don't know which
16 individual sent it.
17 (Whereupon, Henningfield Deposition
18 Exhibit No. 8, schedule of documents, marked.)
19 Q. Let me ask you to look at what is marked
20 as Deposition Exhibit No. 8, which indicates,
21 have you confirmed to us that that is the
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

167

1 schedule of documents faxed to you by Ness
2 Motley?
3 A. Yes. It is.
4 Q. It shows it was sent to you on August
5 21st at 4:30, correct?
6 A. 4:34 p.m.
7 Q. Did you have any discussions with
8 anybody at Ness Motley with respect to your
9 obligations to comply with the requests made in
10 this document?
11 A. I believe that I spoke to Mr. Gruenloh,
12 and that my interpretation, I don't recall if I
13 asked or if I expressed that my interpretation

14 was that this would be new documents and not
15 things which I had been queried about numerous
16 times in numerous depositions and in trial.
17 Q. Did Mr. Gruenloh tell you that you did
18 not have to bring with you documents that you
19 have, other than your new documents?
20 A. I don't recall if he said that was
21 acceptable or not, but that I should be here for
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889
168

1 the deposition regardless.
2 Q. How did you make the decision not to
3 bring the documents with you?
4 A. Well, if he would have said, look, you
5 can't come to the deposition, or his
6 understanding to the best of my knowledge, seemed
7 similar to my understanding, this is ground that
8 we have gone over many, many times, and that this
9 was reasonable and that this was consistent with
10 this whole process.
11 I don't think we discussed it for more
12 than a minute or two, and you will have to ask
13 him, but that's the best of my recollection.
14 Q. Okay. Let me ask you about the use of
15 ammonia compounds in the manufacture of
16 cigarettes.
17 You testified that the use of ammonia
18 compounds influences the bio availability of
19 nicotine, correct?
20 A. Correct.
21 Q. What do you mean by that?
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889
169

1 A. Well, by bio availability, I mean that
2 the amount of nicotine that actually gets into
3 the body of the cigarette smoker, into the
4 bloodstream from the cigarette tobacco rod. A
5 determinant of how much nicotine gets into the
6 bloodstream includes how much nicotine is
7 extracted from the tobacco rod and is vaporized
8 and aerosolized. It is also relevant how much is
9 off-gassed and might bypass the Cambridge filter
10 of the smoking and testing machine, but then is
11 free to be absorbed either directly into the
12 mouth or if it reforms particles which are
13 inhaled into the lung. It can also affect the
14 speed with which absorption occurs, which would
15 not be readily detectable by measuring the
16 nicotine in the blood, but would be expected to
17 have a pharmacological effect by increasing the
18 amount of nicotine delivered into the bloodstream
19 over a given amount of time.
20 These are all aspects of ammonia that
21 have been described in various tobacco company
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889
170

1 documents, have been reviewed and assessed by the

2 U.S. Food and Drug Administration, and are
3 plausible from the perspective of pharmaceutical
4 development.

5 Q. Let me ask you about that, because I
6 understand part of what you are saying, but not
7 all of it.

8 I think there is agreement among
9 everyone that by affecting the pH, nicotine can
10 affect -- excuse me -- ammonia can affect the
11 time course by which nicotine is absorbed from
12 smoke. Correct?

13 A. In the public health and scientific
14 community, I believe there is agreement. There
15 is agreement, I think, in tobacco industry
16 documents. Curiously there was not much
17 agreement about it in the official response of
18 the tobacco industry to the Food and Drug
19 Administration rule on January 2nd or 3rd of
20 1996. So I guess they forgot about it at that
21 time.

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

171

1 Q. However, are you positive that the use
2 of ammonia affects the overall bio availability
3 of nicotine from a given cigarette? And by that,
4 what I mean, it affects how much nicotine the
5 smoker ultimately inhales which then makes its
6 way into the bloodstream?

7 A. To the best of my knowledge, based on
8 the literature that I have reviewed, including
9 industry documents and conferring with other
10 experts bio availability and drug delivery, yes.

11 Q. How does it do that?

12 A. I just listed, I would be happy to
13 repeat my response of a few minutes ago, because
14 it does that, it can do it by many different
15 mechanisms, which are not mutually exclusive.

16 Q. Explain those to me.

17 A. It can influence the amount of nicotine
18 that is extracted from the tobacco itself and
19 vaporized, because free nicotine has a lower
20 boiling point.

21 So it can literally help extract a

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

172

1 higher fraction of nicotine from the tobacco than
2 would otherwise be extracted. It can have a, in
3 some ways more subtle effect on dosing that I
4 think is relevant to marketing by, in principle,
5 putting some of the nicotine into a gas phase
6 which would not be trapped by the Cambridge
7 filter, and, therefore, would not be reported to
8 the cigarette smoker, but which could be absorbed
9 into the body of the cigarette smoker in at least
10 two ways.

11 One way being as the molecules coagulate
12 into particles and are inhaled into the lung; and
13 the other way being absorbed directly through the
14 lining of the mouth and the upper airways.

15 Another prominent effect is by
16 influencing the pH of the material that is being
17 brought into the smoker's body, it can speed the
18 process of absorption through membranes,
19 especially those in the mouth and upper airways
20 and theoretically in the lung, although I think
21 most of us would agree that the percentage or the

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

173

1 amount of influence in the lung would be much
2 lower.

3 Q. Okay. Let me ask you next about the
4 use -- you said that the incorporation of sugars
5 into the cigarette product interacts and affects
6 the nicotine yield?

7 A. No. I said that it can -- I think in
8 principle almost any of these things can affect
9 yield of nicotine, but it can also be used as the
10 basis to form chemicals such as acetaldehyde,
11 which, in turn, interact pharmacologically with
12 nicotine, so that the pharmacological effect on
13 the body is different.

14 And, in essence, this is an indirect way
15 of producing a combination of drug or a drug
16 cocktail, if you will.

17 Q. What different pharmacological effects
18 of nicotine are elicited by incorporating sugars
19 into cigarette products?

20 A. Well, the Philip Morris studies
21 conducted by Victor DeNoble and Paul Neely and

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

174

1 their colleagues show that various combinations
2 of acetaldehyde and nicotine, some of the effects
3 that would ordinarily be attributed to nicotine
4 could be enhanced by the addition of
5 acetaldehyde, such as the reinforcing effects of
6 nicotine, which is one of the mechanisms by which
7 addiction is produced.

8 Q. What do you mean by reinforcing effects?

9 A. The effect that will cause the person,
10 although these studies were with the animals,
11 animal model, to continue to self-administer the
12 drug and to work harder for the drug.

13 Q. Does that mean that cigarettes that
14 incorporate certain sugars as additives are more
15 addictive than cigarettes that do not have those
16 sugars as additives?

17 A. It means that a technique has been used
18 that can potentially increase the addictive
19 potential of the product.

20 Q. Well, do you have an opinion as to
21 whether or not cigarettes that include sugars as

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

175

1 additives are more addictive than cigarettes that
2 do not include sugars as additives?

3 A. I have to use the word "could" because
4 there are so many determinants of the
5 addictiveness. For example, a certain
6 combination might produce a cigarette that
7 produces enhanced pharmacological effects of
8 nicotine, but the sensory characteristics are so
9 awful that nobody would or few people, or that
10 people would be discouraged from smoking them.

11 So it is the end product, the
12 addictiveness is a function of many different
13 parameters of cigarette design. But, certainly,
14 the possibility of producing a drug cocktail has
15 the potential to make the cigarette more
16 addictive than it might otherwise have been.

17 Q. Let me ask you about the use of burn
18 accelerants to influence burn rate. What are
19 your opinions with respect to what the companies
20 have done utilizing burn accelerants that is
21 inappropriate?

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

176

1 A. This goes in part to the marketing of
2 cigarettes that are advertised with lower
3 nicotine and tar yields.

4 And to get the lower nicotine yield, the
5 easiest, or one easy ways would be to simply
6 reduce the nicotine content of the cigarette
7 itself.

8 The way that is achieved in part using
9 burn accelerants is to take advantage of the fact
10 that the cigarette smoking machine takes only one
11 puff per minute; and, therefore, by increasing
12 the burn rate of the cigarette, more of the
13 nicotine from the cigarette literally goes up and
14 out the exhaust system of the building rather
15 than out through the Cambridge filter.

16 When the cigarette smoker smokes the
17 cigarette, and the cigarette smoker will take a
18 puff averaging closer to two puffs per minute,
19 the exact number varies in the studies, the
20 relative impact of the burn accelerant is less,
21 and that means the smoker inhales a larger

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

177

1 fraction of the nicotine that is contained in the
2 cigarette.

3 So it is a technique to beat the smoking
4 machine, if you will, and give smokers more
5 nicotine than is implied by the advertisement.

6 Q. Although the relative impact might be
7 less in a smoker than for the FTC machine,
8 wouldn't a cigarette smoker ultimately inhale
9 less nicotine from a given cigarette, as a result
10 of the presence of burn accelerants, than he
11 otherwise would?

12 A. Compared to what?

13 Q. If there were no burn accelerants
14 present.

15 A. If there were no burn accelerants

16 present, my opinion is that cigarettes would
17 frequently extinguish and in some cases people
18 would reignite them, and in those cases, they
19 wouldn't and they may leave more nicotine and tar
20 in the ashtray, which would probably be a good
21 thing.

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

178

1 But it is a hypothetical you raise. It
2 is not a simple question.

3 Q. No. I think it is a simple question.
4 Let me try it again.

5 By adding burn accelerants that cause a
6 cigarette to burn faster, it means that a smoker
7 inhales less tar and nicotine from any given
8 cigarette than they would if the burn accelerants
9 were not present, correct?

10 A. It may or may not, depending on a lot of
11 other variables, but the important thing is that
12 the impact of the effect is that the individual
13 cigarette smoker is less affected and is more
14 likely to get a higher dosage of nicotine and tar
15 than is implied by the FTC rating, which is based
16 on one puff per minute and which allowed the
17 cigarette to burn for 58 seconds before the next
18 puff.

19 Q. So is it your opinion that the cigarette
20 manufacturers have used burn accelerants to
21 intentionally trick or mislead the consumer as to

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

179

1 the amount of nicotine that the consumer will
2 obtain relative to the FTC measurement of
3 nicotine?

4 A. I believe that is one of the many tools
5 that are employed to that end.

6 Q. And your belief in that regard is based
7 upon your review of documents from the
8 manufacturers, correct?

9 A. In part, as well as previously publicly
10 available documents, such as the Colin Browne
11 Monograph, Dietrich Hoffman's papers, I'm not
12 sure if Rickert has written about it.

13 Q. Can you identify for me the documents of
14 the cigarette manufacturers that you are relying
15 upon in that regard?

16 A. Sure. They are documents that were
17 included, that we discussed in previous
18 depositions and trial, but I do not have them
19 with me.

20 Q. Let me ask you about the reintroduction
21 of nicotine into reconstituted tobacco.

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

180

1 A. Can we take a break for a few minutes?
2 MR. FURR: If you need a break, we can.
3 (Break.)

4 Q. Dr. Henningfield, let me ask you some
5 questions now about reconstituted tobacco.
6 The process through which reconstituted
7 tobacco is used results in the nicotine first
8 being extracted from the tobacco, correct?
9 A. Yes, not necessarily all of it, but some
10 of it at least.
11 Q. And some of what is extracted is
12 reintroduced, correct?
13 A. Whether or not it is the same nicotine
14 that is being taken out and put back, I think the
15 important thing to me is that nicotine from some
16 source is put back. I doubt that they carefully,
17 just take what was taken out and put it back in.
18 Q. Well, isn't it true that after the
19 nicotine is reintroduced, that the nicotine level
20 in the reconstituted tobacco is less than the
21 nicotine level of the same tobacco before the
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

181

1 reconstitution process?
2 A. I don't know if that's the case or not.
3 One of the problems is still not having good
4 access to brand-specific aspects of cigarette
5 manufacturing that I think would be helpful to me
6 and others in the public health field. But I
7 think as a general premise, that is accepted.
8 Q. Reconstituted tobacco of a given type
9 has a lower nicotine level than the same type of
10 tobacco does prior to reconstitution.
11 A. Is that a fact or --
12 Q. I'm asking you: Isn't that correct?
13 A. It depends on how much nicotine they put
14 back into it.
15 Q. As reconstituted tobacco is utilized in
16 modern cigarette products?
17 A. In general, I believe that it is lower;
18 but, again, the manufacturers are free to vary it
19 and on a brand-specific basis, I wish I knew more
20 of what they did.
21 Q. Let me ask you some questions about
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

182

1 documents. Where do you obtain -- where and from
2 whom do you obtain the tobacco industry documents
3 that you reviewed?
4 A. For the purposes of the Washington
5 trials and depositions that have had specific
6 documents listed and presented, some of the
7 documents are the same as those that the FDA had
8 uncovered in its investigation; and some of the
9 documents were those that I had not seen when I
10 was working with FDA, but were presented to me by
11 various plaintiffs attorneys; and I obtained
12 other documents from other colleagues in the
13 field; but the documents that I would be relying
14 upon for this case, to the best of my knowledge,
15 would be restricted to those that have already
16 been provided to me, and listed in prior

17 proceedings.
18 Q. How many total hours do you believe that
19 you have spent reviewing tobacco industry
20 documents?
21 A. Hundreds and hundreds. I'm betting it
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

183

1 is more than a thousand hours. Again, this
2 includes my work for the Food and Drug
3 Administration and for when I was a member of the
4 National Institutes of Health and assisting the
5 U.S. Congress in their investigations and the
6 Food and Drug Administration, so cumulatively,
7 gosh, I'm going to guess that it was more than a
8 thousand hours, probably less than 2,000 hours.

9 Q. What percentage of that time was spent
10 reviewing documents for plaintiffs attorneys in
11 cases against the cigarette manufacturers?

12 A. I would guess more than 10 percent, less
13 than 50 percent, answering to the best of my
14 ability.

15 I just haven't plotted it that way or
16 kept track of it that way.

17 Q. Have you ever gone to the Minnesota
18 document repository to review documents?

19 A. Not physically.

20 Q. Have you reviewed documents on line?

21 A. Yes.

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

184

1 Q. What documents did you look at?

2 A. The Philip Morris, the R.J. Reynolds. I
3 believe those are the only two that I have
4 personally accessed. What is more typical is one
5 of my colleagues, who is more skillful at
6 negotiating these sites, will find something for
7 me or search something for me, but so I think in
8 my personal actual on-line, I have gone to the
9 Philip Morris, gone to the R.J. Reynolds. I'm
10 pretty sure I have gone to Brown & Williamson,
11 but I'm not absolutely positive, just because I
12 might have initiated it or had the program blow
13 up or had a problem and call one of my colleagues
14 that was better at negotiating the site.

15 Q. Help me understand something, because
16 through our discussion today it has become less
17 than clear to me. Do you currently intend to
18 review additional tobacco industry documents
19 prior to testifying at trial?

20 A. For the trial, I expect to be relying
21 exclusively on the documents that have been

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

185

1 previously listed and described and discussed in
2 depositions and trial unless plaintiffs and/or
3 defendants show me a document that they believe
4 is critical and would influence my opinion.

5 On the other hand, I expect that I will
6 be, as a part of what I just do as a professional
7 in this field, I will be seeing many, many more
8 documents, but those will not be documents that I
9 will be referring to for the purposes of the
10 trial.

11 Q. Have you had discussions with plaintiffs
12 counsel in this case about reviewing additional
13 documents before trial?

14 A. The only discussion is that what I have
15 told Ness Motley attorneys is that I have seen
16 many documents since those that were listed for
17 the attorneys general cases, and since those that
18 were listed and used for the Washington State
19 trial, but I have not seen anything that has
20 changed my opinions and nothing that I felt was
21 necessary to rely upon for trial.

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

186

1 Q. Let's go back to your disclosure. Under
2 subject matter of anticipated testimony, the
3 second sentence reads:

4 Dr. Henningfield will testify regarding
5 the defendants' research and the impact on public
6 health of the industry suppression of relevant
7 data and the industry's denials concerning the
8 health consequences of smoking, correct?

9 A. Correct.

10 Q. What research by defendants in this case
11 has been suppressed in a manner that has affected
12 the public's health in your opinion?

13 A. A lot. Having said that, let me give
14 you a couple of examples.

15 Q. I want you to be as comprehensive, as
16 you can be.

17 A. A prominent example that I'm intimately
18 familiar with is the suppression of the work of
19 Dr. Victor DeNoble and Paul Neely and their
20 colleagues on the nicotine self-administration
21 model that they developed at Philip Morris.

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

187

1 That was, I believe, of major
2 consequence, because such a rat model would have
3 been important in furthering our understanding of
4 the addiction process and developing treatments,
5 and that is evidenced by the rapid acceleration
6 of knowledge that has occurred since
7 Dr. Corrigall and his colleagues,
8 C-O-R-R-I-G-A-L-L, Dr. William Corrigall at the
9 Addiction Research Foundation developed and
10 published a model and did the kind of replication
11 research that enabled the model to be useful.

12 That is a specific example of deliberate
13 suppression that I believe this had a significant
14 impact on the facts.

15 Q. Before we go to the next example,
16 explain to me how what you believe to have been
17 suppression of research by Dr. DeNoble and Paul

18 Neely has impacted public health.
19 A. The rat model of drug
20 self-administration is an important model and is
21 used in pharmaceutical companies, and is used by
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

188

1 public health-supported researchers by federal
2 agencies to explore the control of behavior and
3 to develop medicines.
4 For example, recently, there is work
5 that is accelerating on the development of
6 possible vaccines that use rat models of nicotine
7 withdrawal and increasing with
8 self-administration.

9 These are avenues of research that are
10 leading to treatments; and, in my opinion, the
11 field and cigarette smokers have lost someplace
12 in the area of six or seven years of time due to
13 the suppression of this research.

14 Q. Let me ask you about that. You said
15 that Dr. Corrigall at the Addiction Research
16 Foundation has published or created a model
17 similar to that which you believe was suppressed
18 from the work of Dr. DeNoble and Paul Neely,
19 correct?

20 A. That which I know was suppressed by
21 DeNoble and Neely.

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

189

1 Q. And how has Dr. Corrigall's model
2 improved public health?

3 A. If you look at the literature like I do,
4 you see that there has been a, what I think could
5 be described as an explosion of research using
6 rat self-administration models to better
7 understand the molecular genetics of nicotine
8 addiction, to test new medicines, to screen
9 medicines, to develop a better understanding of
10 the interaction between nicotine tolerance and
11 self-administration.

12 It is being used in federally supported
13 laboratories at this time, rat models which
14 Corrigall's work showed to be relevant, are being
15 used in the development of, have been used in the
16 development of a vaccine which has recently been
17 either ready for human testing or will soon be
18 ready for human testing. These are major areas
19 of potential means to more effectively prevent
20 and treat tobacco dependence.

21 Q. So I want to make sure I understand your
COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

190

1 testimony. Although it is potentially going to
2 be helpful in the future, at least so far, there
3 has been no developments through the use of
4 Dr. Corrigall's model that have been of
5 assistance in treating nicotine dependence or

6 addiction; is that correct?
7 A. The new medicines are not available, but
8 the way you have stated it is a broad
9 overstatement.

10 Q. What did I overstate?

11 A. I believe you say it has not been
12 useful. Maybe you can restate it.

13 Q. Although it is potentially going to be
14 helpful in the future, at least so far there have
15 been no developments through the use of
16 Dr. Corrigall's model that have been of
17 assistance in treating nicotine dependence or
18 addiction; is that correct?

19 A. No. It is not correct. I think at a
20 general level, in the field of medicine, when you
21 have an animal model, it helps physicians to

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

226

1 A. The smooth Camel campaign that we --
2 that I mentioned earlier.

3 Q. We have talked about that one. Do you
4 have another example?

5 A. No.

6 Q. All right. Do you have any other
7 opinions or can you identify for me any other
8 examples of what you are talking about or rely
9 upon for your opinion that the industry has
10 conducted research but suppressed it and thereby
11 negatively impacting the public health?

12 A. An area of research that R.J. Reynolds
13 and Philip Morris engaged in was on nicotine
14 analogs, which is chemicals other than nicotine
15 or related to nicotine that may have some similar
16 properties.

17 It is possible that in their drug
18 discovery and evaluation process, that they have
19 discovered chemical entities that could be useful
20 in the treatment of tobacco dependence and, in
21 fact, the possibility is not completely

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

227

1 hypothetical, as we know now that R.J. Reynolds
2 has spun off a drug company, I don't know what
3 Philip Morris has done that may be useful to
4 public health, but I know that they had a
5 nicotine analog program.

6 This is something I would be interested
7 in, because I'm interested in medicines to more
8 effectively treat tobacco dependence. So this is
9 an area of research where it would be useful to
10 have more information.

11 Q. Do you believe that R.J. Reynolds or
12 Philip Morris has discovered a nicotine analog
13 that would be useful in treating nicotine
14 dependence or addiction?

15 A. I think it is plausible.

16 Q. I'm asking you what beliefs you hold

17 today. Do you think that that has occurred?
18 A. Whether it ultimately gets to the market
19 is a function of a lot of things, but on the
20 basis of information that R.J. Reynolds is now
21 presenting on some analogs, publicly, I think it
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

228

1 is plausible that they have analogs that could be
2 useful to treat tobacco dependence. I don't know
3 that for a fact, that's, I guess, the best way I
4 can say it.

5 Q. Can you identify for me any other
6 research that you believe that the industry has
7 conducted but suppressed, that had it released,
8 it would have impacted public health?

9 A. Not specific areas.
10 MR. GRUENLOH: Take a quick bathroom
11 break?

12 MR. FURR: Sure.
13 (Break.)

14 Q. Okay, Dr. Henningfield, I want to
15 continue with the second sentence of your
16 disclosure, and ask you what opinions you are
17 prepared to testify to regarding what is
18 described as the industry's denials concerning
19 the health consequences of smoking.

20 A. The area that I am most familiar with
21 has to do with the addiction area. This was an
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

229

1 area where, in my opinion, had the industry been
2 fully forthcoming with its data, the 1964 Surgeon
3 General's Report would have labeled nicotine
4 addicting instead of habituating.

5 And in the early 1980's when the
6 National Institute on Drug Abuse recommended that
7 cigarettes be labeled as addicting the industry
8 fought that and prevented the label.

9 In 1988, when the nicotine addiction
10 Surgeon General's Report came out, and led to a
11 reasonable expectation of those in the U.S.
12 Public Health Service, including the Surgeon
13 General, that cigarettes would be labeled as
14 addicting, the industry successfully opposed the
15 label.

16 And I believe this has had enormous
17 consequences for public health.

18 Q. Okay. Let's take those one at a time.
19 What did the industry know, prior to 1964, that
20 had it been divulged to the Surgeon General,
21 would have resulted in the '64 Surgeon General's
COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

230

1 Report labeling nicotine as addicting instead of
2 habituating?

3 A. In that report, nicotine, as was
4 described in the report, was clearly in a gray

5 area, where judgment calls were made. It was
6 recognized to be an important pharmacological
7 factor in smoking, that met the criteria for what
8 was then called habituating.

9 It was not put into the addicting
10 category.

11 The tobacco industry, in my opinion, had
12 they come forth at that time and said what we now
13 see as evident in their documents, that
14 cigarettes without nicotine would not be --
15 cigarettes would not maintain the industry, that
16 that would have kept the balance, and the Surgeon
17 General would have concluded that cigarettes are
18 addicting.

19 Q. What documents are you referring to with
20 respect to the industry's documents in that
21 response?

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

231

1 A. Some of them are Claude Teague's
2 statements and conclusions, and I do not recall
3 the names of other individuals offhand, but there
4 are several documents that I have seen from
5 several companies, that I would be happy to
6 retrieve, that show that the companies themselves
7 had come to conclude that nicotine had
8 pharmacological effects that were critical in
9 tobacco dependence, that addiction was an
10 appropriate label, and this did not come to
11 light, to the best of my knowledge, then. It
12 came to light in recent years as a result of the
13 litigation process.

14 Q. And you believe that those ideas are
15 expressed in industry documents that you can
16 identify and provide to Mr. Gruenloh?

17 A. Yes.

18 (Whereupon, Henningfield Deposition
19 Exhibit No. 9, excerpt from 1964 Surgeon
20 General's Report, marked.)

21 Q. Dr. Henningfield, let me hand to you
COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

232

1 what we have marked as your Deposition Exhibit
2 No. 9 and have you examine this and verify for us
3 that I have marked as Exhibit 9 selected pages
4 from the 1964 Surgeon General's Report.

5 Do you have an extra one?

6 MS. MOORE: Yes.

7 MR. GRUENLOH: Thanks.

8 A. Yes.

9 Q. Let me ask you to turn to page 351.

10 A. Okay.

11 Q. On that page, the 1964 Surgeon General's
12 Report, listed the definitions and the
13 characteristics of drug addiction versus drug
14 habituation, that the Surgeon General was then
15 employing, correct?

16 A. Correct.

17 Q. Drug addiction was defined as a state of

18 periodic or chronic intoxication produced by the
19 repeated consumption of a drug, natural or
20 synthetic, correct?

21 A. Correct.

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

233

1 Q. If that were the definition of addiction
2 by which cigarettes were tested today, with
3 everything that we know today, cigarettes would
4 not be designated as addictive, would they?

5 A. It depends how heavily they weighted
6 that factor. In this Surgeon General's Report,
7 as the record shows, there were opinions
8 developed by a committee. It was not as simple a
9 checkoff process as this table might imply.

10 And I believe that, had the industry
11 come forward and said nicotine is addicting, and
12 people won't smoke cigarettes without it, because
13 it is so critical, that they would have
14 interpreted, made the interpretation that
15 addiction was the appropriate word in the same
16 way that various committees concluded that
17 cocaine was addicting, depending upon how they
18 evaluated the data at that time.

19 Q. Are cigarettes intoxicating?

20 A. They can, but in general, cigarette
21 smokers do not become intoxicated and that is

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

234

1 unusual.

2 Q. If a test for whether or not a drug is
3 addicting, is whether or not the drug produces a
4 state of periodic or chronic intoxication
5 produced by the repeated consumption of a drug,
6 nicotine and cigarettes do not meet that
7 definition, do they?

8 A. If that is the sole or the major
9 criterion, then cigarettes do not.

10 Q. And there is nothing in the industry's
11 documents suggesting that, in fact, nicotine or
12 cigarettes do produce periodic or chronic
13 intoxication, is there?

14 A. No, not that I am aware of.

15 Q. The Surgeon General also listed certain
16 characteristics of drug addiction on page 351,
17 correct?

18 A. Correct.

19 Q. The Surgeon General identified one
20 characteristic as an overpowering desire or need,
21 compulsion, to continue taking the drug and

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

235

1 obtain it by any means, correct?

2 A. Correct.

3 Q. Cigarette smokers are not so compelled
4 to smoke that they will obtain the drug by any
5 means, are they?

6 A. I think if you look at the evaluations
7 of drugs by those criteria, by the committee that
8 formulated the criteria, you can either interpret
9 that no drug meets the criteria, or that there
10 are drugs such as morphine and alcohol and
11 nicotine in sufficient cases do produce those
12 effects, to label them as addicting, otherwise no
13 drug would be considered addicting.

14 Q. Do cigarette smokers commit crimes
15 against people and property in order to obtain
16 their cigarettes in the same way that heroin
17 addicts do?

18 A. There have been instances when that has
19 occurred, when they have been unable to get
20 cigarettes and, in fact, it was the tobacco
21 industry itself that threatened that there would

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

236

1 be massive smuggling and associated crime if
2 efforts were made to take the nicotine out of
3 cigarettes.

4 That was tobacco industry testimony
5 before Congress.

6 Q. Have you ever heard of a case where a
7 cigarette smoker physically assaults someone or
8 robs a store in order to obtain their cigarettes?

9 A. Yes.

10 Q. Tell me about that.

11 A. I have press accounts that I would be
12 happy to pull out for you, and also in Italy in,
13 I believe, 1992, when cigarette manufacturers
14 were on strike, there was crime that was reported
15 in the press, specifically, having to do with
16 obtaining cigarettes.

17 In the United States, since cigarettes
18 are so widely available and so easily available,
19 we haven't seen that as much.

20 Q. Are cigarette smokers willing to steal
21 and assault family members, friends and strangers

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

237

1 on the street in order to obtain cigarettes and
2 money for cigarettes in the same way that people
3 addicted to cocaine or heroin are?

4 A. It is a meaningless question. You don't
5 have a situation where people would have to, so
6 you don't know.

7 Q. Do you think that if deprived of their
8 cigarettes, there is a likelihood that cigarette
9 smokers would begin assaulting and robbing
10 others, in efforts to obtain cigarettes?

11 A. Well, that was part of the scenario that
12 the tobacco industry raised in 19, I believe,
13 1996 and 1997, when it was opposing the FDA's
14 attempted jurisdiction over tobacco, and I
15 concurred with the tobacco industry that, in
16 fact, people could under some instances go to
17 great lengths to obtain tobacco.

18 Q. How many crimes are committed in the

19 United States every year by cigarette smokers
20 that have been deprived of their nicotine who
21 commit the crimes in an effort to obtain the
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

238

1 nicotine?

2 A. I don't know, but, again, it is almost a
3 meaningless question, when cigarettes are
4 relatively cheap and extremely convenient.

5 Q. Now, are there industry documents that
6 you have seen that the industry could have
7 provided to the Surgeon General in 1964, in which
8 the industry could have warned the Surgeon
9 General of these dangerous and violent tendencies
10 of cigarette smokers if deprived of their
11 nicotine that might have made a difference in
12 whether or not smoking was described as addictive
13 in the '64 report?

14 A. For the record, you are the one that has
15 talked about dangerous and violent tendencies,
16 that is not something that I have stated.

17 Q. Can you answer the question?

18 A. I want to make sure that you don't put
19 words in my mouth, because that's not something I
20 have stated.

21 Q. I may have misunderstood you. Go ahead
COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

239

1 and tell me about the documents that the industry
2 had but did not share that contained information
3 pertaining to the potentially dangerous and
4 violent tendencies of cigarette smokers deprived
5 of their nicotine.

6 A. That's not my testimony, and that's not
7 what I have documents on.

8 Q. All right. Let's walk through these one
9 at a time. Your testimony is that the industry
10 has information that had it shared with the
11 Surgeon General in 1964, would have resulted in
12 cigarettes being identified as addicting, not
13 habituating?

14 A. Correct.

15 Q. What I am doing is walking through the
16 components of the definition test for addiction
17 that the Surgeon General used then and asking you
18 to identify for me the information that the
19 industry had but did not share. You understand
20 what we are doing, don't you?

21 A. Yes.

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

240

1 Q. Okay.

2 A. I don't know what specific studies the
3 industry conducted. I know what their
4 conclusions were, and if the industry had data to
5 support those conclusions, they should have come
6 forward.

7 If they drew those conclusions without
8 having data, they should have come forth and
9 said, look, we think this stuff is appropriately
10 labeled addicting, maybe your definition doesn't
11 match. They didn't. I don't know what data they
12 had.

13 But I know they were conducting
14 research, some of which we have seen, that
15 includes project Hipple and other lines of
16 research. I don't know what other research they
17 had, but they came to some very strong
18 conclusions about the role of nicotine that were
19 stronger than the Surgeon General's conclusions.

20 Q. Let me see if I understand this, is it
21 your testimony that if the industry had shared

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

241

1 with the Attorney General in 1964 their
2 conclusions about the role that nicotine plays in
3 smoking, that the Surgeon General would have used
4 a different definition of addiction in 1964?

5 A. I think the Surgeon General would have
6 come to a different conclusion. They may have
7 interpreted the data differently.

8 And, again, when you are looking at
9 definitions like this, it is not a simple
10 checklist, but you bring together a group of
11 experts, you look at all the available data.

12 Q. Let me ask you to look at the third
13 criteria that the Surgeon General, I should say
14 the third characteristic of drug addiction that
15 the Surgeon General described in 1964, and that
16 is a psychic, psychological and generally a
17 physical dependence on the effects of the drug,
18 correct?

19 A. Correct.

20 Q. Now, what information did the cigarette
21 manufacturers have available to them in 1964 that

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

242

1 demonstrated that nicotine produces a psychic or
2 physical dependence on the effects of the drug?

3 A. It is clear from their documentation
4 that they understood that the pharmacological
5 actions of nicotine on the body and the nervous
6 system and hormonal system that produced effects
7 ranging from stimulization to tranquilization and
8 these were psychic and psychological effects,
9 were important if not critical in the use of
10 tobacco, and this was part of the basis, for
11 example, for the project Hipple work that was
12 being done. I think they understood that very
13 clearly.

14 Q. Can you identify for me the specific
15 documents you are relying on for this testimony?

16 A. I can get them for you. They were
17 discussed in some depositions and at trial
18 before.

19 Q. All right. With respect to information

20 that the industry may have had regarding the
21 physical dependence that nicotine produces on
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

243

1 smokers, what information did the industry have
2 that the Surgeon General did not have?

3 A. I don't know what specific information
4 they had. Again, I have the basis of their
5 conclusions, and glimpses of their research
6 programs.

7 Again, you are asking me a hypothetical,
8 what they had when they were not forthcoming, yet
9 their leaders came to very strong conclusions
10 regarding nicotine. I don't know what all they
11 had.

12 Q. I didn't ask you a hypothetical. As I
13 understand your testimony, it is that the
14 industry was in possession of information that
15 had it shared with the Surgeon General in 1964,
16 the Surgeon General would have reached a
17 different conclusion, correct?

18 A. Correct.

19 Q. I'm asking you to identify that
20 information for me, with respect to physical
21 dependence.

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

244

1 A. I believe that if Claude Teague and
2 others had come forward and said nicotine is
3 addicting, that that would have opened up that
4 line of investigation by the Surgeon General and
5 had the industry then shared everything that went
6 into his conclusions, and those of other leaders
7 in the tobacco industry, that the committee would
8 have concluded, as the industry had, that
9 nicotine was appropriately categorized as
10 addicting. I don't know what all research they
11 had conducted. I don't know what all data they
12 had. They certainly, by that point, had lots of
13 market data, because they had been marketing
14 brands of cigarettes, and they knew how they had
15 to manufacture them to maintain their market and
16 to keep smokers hooked.

17 Q. Let me ask you this question: I want you
18 to assume that I have asked Dr. Benowitz whether
19 or not cigarettes are addicting using the
20 definition of drug addiction found in the '64
21 Surgeon General's Report, and he said no. Would

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

245

1 you agree with Dr. Benowitz if, in fact, that is
2 what he has testified to?

3 A. If you take a narrow view of this
4 definition, as we have, as I have already agreed,
5 cigarettes, for example, do not typically produce
6 chronic intoxication.

7 So in the very narrow sense of that

8 definition, I would concur that they do not meet
9 that criterion, and if that was Dr. Benowitz's
10 conclusion, we would both be concurring.
11 My point is that the industry itself had
12 come to a different conclusion as to the
13 appropriate categorization of nicotine, and if
14 they had information that led them to that
15 conclusion, they should have been fully
16 forthcoming to the Advisory Committee to the
17 Surgeon General and laid out everything that they
18 had.

19 And I don't know for certain that the
20 committee then would have labeled nicotine
21 addicting, and we'll never know because the

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

246

1 cigarette industry did not come forward.

2 Q. You would agree with me that it is
3 speculative as to whether or not the committee
4 would have labeled nicotine as addicting in 1964,
5 if the industry had provided to the committee the
6 information that you believe it had in its
7 possession.

8 A. What I would say is, as I have testified
9 before, that it is plausible that they would have
10 regarded nicotine as addicting, but we'll never
11 know, because the industry didn't come forward
12 with what they concluded or what they know.

13 MR. GRUENLOH: I guess we're off the
14 record.

15 (Discussion off the record.)

16 Q. Dr. Henningfield, let's go forward in
17 time to 1988.

18 A. Okay.

19 Q. 1988 Surgeon General's Report was the
20 first report in which the Surgeon General labeled
21 cigarette smoking as an addiction; is that

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

247

1 correct?

2 A. It was the main report. In the 1986
3 report the Surgeon General came to that
4 conclusion with respect to smokeless tobacco, and
5 an implication was that the conclusion applied to
6 cigarettes. But it was clear to all of us that a
7 full investigation needed to be done for
8 cigarettes, so that went into what became the
9 1988 Surgeon General's Report.

10 Q. Didn't the Surgeon General's 1986 report
11 address environmental cigarette smoke?

12 A. There were two reports that year, and
13 one was an advisory committee, the Surgeon
14 General under the leadership of the National
15 Cancer Institute, which focused on smokeless
16 tobacco.

17 Q. I want to make sure that I have a clear
18 answer to the question I asked though, and that
19 is the following:

20 1988 was the first Surgeon General's

21 Report in which smoking was described as an
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

248

1 addictive behavior, correct?

2 A. Again, if you look at the 1986 report,
3 it is discussed, and it is a reasonable
4 inference, and that was the basis, this wasn't a
5 trivial event, that was the basis for the Surgeon
6 General requesting a full investigation of
7 cigarettes, and the 1988 report was then the
8 major statement that was specific to cigarettes.

9 I was involved in both reports, so I
10 understand the process, and it is a distinction
11 that may not be evident or important to you, but
12 it is one that is true, and I would be happy to
13 walk through the '86 report with you, and if you
14 would like to understand what I am saying, the
15 1988 report, I think it is fair to say, it is the
16 landmark report that should have left no doubt
17 that nicotine in cigarettes was clearly
18 addictive.

19 Q. Now, in 1988, the Surgeon General
20 defined nicotine, excuse me, defined addiction
21 through the development of two sets of criteria,

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

249

1 those being the primary criteria and the
2 secondary criteria, correct?

3 A. Correct.

4 Q. In 1988, the Surgeon General identified
5 three primary criteria for addiction; is that
6 correct?

7 A. Correct.

8 Q. And those criteria were whether or not a
9 substance was used compulsively, correct, that
10 was one of them?

11 A. Correct.

12 Q. The second criterion was whether or not
13 a substance was psycho active, correct?

14 A. Correct, psycho active reinforcing
15 effects.

16 Q. And the third criterion was whether or
17 not the use of the substance was reinforcing,
18 correct?

19 A. Correct.

20 Q. Now, the fact that nicotine and
21 cigarettes are sometimes smoked compulsively or

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

250

1 psychoactively and can be reinforcing, all of
2 those things were known in 1964, by the Surgeon
3 General; is that correct?

4 A. They were known, and in making a
5 conclusion -- and I'm familiar with the process
6 that was used to differentiate drugs into the
7 habituating and addicting category at the time,
8 and which Dr. Seevers participated in at the

9 World Health Organization, judgment calls were
10 made based on the relative weight of the
11 evidence, and the confidence in the evidence.

12 For example, you could say at the '64
13 Surgeon General's Report, the committee had the
14 benefit of Lennox Johnston's 1942 study with
15 intravenous nicotine and the committee referred
16 to it, but they also discounted it, because it
17 was a single study that hadn't been replicated.

18 So you can say that they had this
19 information, but they were a long way from having
20 the knowledge in 1964 that was available in 1988,
21 or, frankly, that was available in 1980, when the

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

251

1 American Psychiatric Association concluded that
2 tobacco dependence was a legitimate category, as
3 was morphine dependence, for example.

4 Q. Let me ask it this way: In 1964, the
5 committee that produced the Surgeon General's
6 Report recognized that nicotine was psychoactive,
7 correct?

8 A. Correct.

9 Q. In 1964, the committee that produced the
10 report recognized that the use of nicotine
11 through smoking cigarettes was reinforcing,
12 correct?

13 A. The data then were indirect, and the
14 term they used was social behavior reinforced by
15 the pharmacological actions of nicotine.

16 So they used that word in their summary
17 in that Surgeon General's Report.

18 They, frankly, had little specific data
19 on the reinforcing actions of nicotine at that
20 time and, in fact, the first animal, published
21 animal study or presented animal study was by the

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

252

1 Inoki, et al., I-N-O-K-I, researchers in
2 Michigan, in, I believe, 1976, presented at the
3 Committee on Drug Dependence.

4 Q. In 1964, the committee on the Surgeon
5 General's Report also knew that the habit of
6 smoking became compulsive in some nature,
7 correct?

8 A. Correct.

9 Q. Despite that knowledge, in 1964, the
10 Surgeon General chose to label cigarette smoking
11 as habituating as opposed to addicting, correct?

12 A. The advisory committee came to that
13 conclusion, based on the data they had and the
14 testimony that they had.

15 Q. Now, if, in 1964, the Surgeon General
16 had utilized the same three primary criteria that
17 were utilized in evaluating nicotine in the 1988
18 report, in all likelihood nicotine would have
19 been labeled as addicting in 1964. Would you
20 agree with that?

21 A. It is really speculative. So many

1 things are different, in part, because the
2 criteria that evolved from the World Health
3 Organization from 1964 on, abolished the
4 distinction between habituating and addicting
5 drugs and replaced it with the technical term
6 used by the Surgeon General's committee in 1988,
7 and in other venues, which was dependence.

8 So it is a meaningless question that
9 could only be speculated on.

10 Q. Difficult to know what decision a group
11 of people would have made 45 years ago, if they
12 had had different information available to them,
13 isn't it?

14 A. That's been my testimony.

15 Q. And in 1964, the Surgeon General did
16 know that smoking can be very difficult to quit
17 for some smokers, correct?

18 A. Correct.

19 Q. I ask you to turn to page 352 of the
20 1964 Surgeon General's Report, titled
21 relationship of smoking to use of addicting

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

1 drugs. Second paragraph. Proof of physical
2 dependence requires demonstration of a
3 characteristic and reproducible abstinence
4 syndrome upon withdrawal of the drug or chemical
5 which occurs spontaneously, inevitably, and is
6 not under control of the subject.

7 Neither nicotine nor tobacco comply with
8 any of these requirements. That is a correct
9 statement today, isn't it, Dr. Henningfield?

10 A. Which part, that neither nicotine or
11 tobacco meet criteria for physical dependence; is
12 that what you are asking?

13 Q. No. I'm asking the question I asked.
14 Let me ask it again. In 1964, the Surgeon
15 General stated the following: Proof of physical
16 dependence requires demonstration of a
17 characteristic and reproducible abstinence
18 syndrome upon withdrawal of a drug or chemical
19 which occurs spontaneously, inevitably and is not
20 under control of the subject.

21 Neither nicotine nor tobacco comply with
COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

1 any of these requirements. In fact, many heavy
2 smokers may cease abruptly and while retaining
3 the desire to smoke, experience no significant
4 symptoms or signs or withdrawal.

5 That's what the Surgeon General stated
6 in '64, correct?

7 A. The Surgeon General stated the two
8 sentences that you read.

9 Q. I read three sentences.

10 A. Okay. The three sentences.
11 Q. I read it correctly?
12 A. What you read is what the Advisory
13 Committee wrote.
14 Q. And, in fact, it is true, isn't it,
15 Dr. Henningfield, that many heavy smokers may
16 cease smoking abruptly and while retaining the
17 desire to smoke, may experience no significant
18 symptoms or signs on withdrawal. That is a true
19 statement, isn't it?
20 A. Well, it says symptoms or signs, and it
21 is not necessarily true. The reason it is not
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

256

1 necessarily true is you can have objective signs
2 which some individuals may tolerate better than
3 others. For example, in our laboratory studies,
4 we found changes in brain function to occur
5 reliably in people that were indicative of
6 physical dependence, though not all of those
7 individuals appeared to be visibly suffering
8 symptoms, and this is the distinction between
9 signs and symptoms. So I'm not sure that it is
10 true then, I'm not sure that it is true now. It
11 is the case that many heavy smokers cease
12 abruptly. We know the same is true of heroin,
13 cocaine and alcohol. So that doesn't distinguish
14 nicotine there.
15 Q. All right. Let me try it. Many heavy
16 smokers stop smoking cold turkey, don't they?
17 A. Correct.
18 Q. Without any assistance from physicians,
19 either in the nature of counseling or nicotine
20 supplementation or any other way, correct?
21 A. Let me qualify that. You are using the
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

257

1 word "many" and "many" is meaningless unless we
2 evaluate it in the context of how many people
3 make the effort. And in the context of how many
4 people make the effort, a more correct statement
5 is that a small percentage of heavy smokers cease
6 abruptly.
7 Q. Some heavy smokers cease abruptly, that
8 is a fair statement?
9 A. That's a fair statement.
10 Q. Some heavy smokers cease abruptly and go
11 cold turkey, no help from an a physician, in the
12 nature of counseling or any other assistance,
13 correct?
14 A. That's correct.
15 Q. Some of those heavy smokers who stop
16 smoking cold turkey experience no symptoms that
17 disrupt their lives; is that correct?
18 A. That's correct.
19 Q. Tell me what your testimony would be
20 with respect to the early 1980's when the
21 National Institute on Drug Abuse recommended that
COURT REPORTING CONCEPTS, INC.

1 cigarettes be labeled as addicting but was
2 resisted by the tobacco industry.

3 A. The director of the National Institute
4 on Drug Abuse, Dr. William Pollin, testified
5 before Congress and I believe that Surgeon
6 General Koop gave testimony, but the key
7 testimony that I am familiar with was that by
8 Dr. William Pollin who was director of the
9 National Institute on Drug Abuse, and in the
10 hearings, the tobacco industry experts, such as
11 Theodore Blau, B-L-A-U, testified that cigarettes
12 were more like hamburgers than they were like
13 addictive drugs.

14 And my opinion is that this sort of
15 testimony from the industry that ostensibly knew
16 a lot about their product was important in
17 blocking the recommendation that cigarettes be
18 labeled as addicting.

19 Q. What type of hearings were you talking
20 about now?

21 A. Waxman chaired at least one of the
COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

1 hearings, in the fall of '82, spring of '83, in
2 that period, I believe there were two hearings.

3 Q. Is it your position that the cigarette
4 manufacturers' position in those hearings
5 convinced Congress not to adopt a label warning
6 regarding the addicting or dependence producing
7 properties of nicotine?

8 A. It was clearly a factor, because the
9 industry could have come in and stated what their
10 more recent documents are stating and what Philip
11 Morris is now stating on its web site, cigarettes
12 are addicting, or it could have done what it did,
13 which is send in people like Theodore Blau to
14 compare cigarettes to hamburgers and trivialize
15 the importance of nicotine.

16 They chose to do the latter and the
17 record speaks for itself.

18 Q. Tell me how it is you know that members
19 of Congress made their decisions as to whether or
20 not to proceed with legislation requiring
21 additional labeling based upon the testimony of

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

1 Theodore Blau and others at the congressional
2 hearings?

3 A. I can't take a specific committee
4 recommendation or vote to one person's testimony.
5 What I can do is recall that I was involved in
6 the process and participated in the process, and
7 that the National Institute on Drug Abuse had
8 come to a conclusion, which was opposed by the
9 tobacco industry, and which, as we sit here
10 today, we now know that the tobacco industry's

11 documentation that they had were different from
12 what they testified before Congress.
13 Now, had the industry come forward and
14 said nicotine in cigarettes is addicting and
15 dosage control is critical, and these are all the
16 things we do, is it possible that the committee
17 would have rejected the industry's conclusions
18 and not required the label of addicting? It is
19 possible. I don't know.
20 But we don't know, because the industry
21 opposed it.

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

261

1 Q. Let me ask you this: The Surgeon
2 General's Report on addiction in which the
3 definitive conclusion was reached about the
4 addictive properties of cigarettes came out in
5 1988, correct?
6 A. Correct.
7 Q. Over twelve years ago, correct?
8 A. Correct.
9 Q. And that there has been no warning label
10 with respect to addiction placed on cigarette
11 packs in the intervening twelve years, correct?
12 A. Correct. Well, no, that's not correct,
13 Liggett put the label.
14 Q. By Congress?
15 A. But you are right. Congress hasn't
16 ordered it.
17 Q. When did the documentation from the
18 cigarette manufacturers, with respect to their
19 views of the dependence producing properties of
20 cigarettes first become available to Congress and
21 anyone interested in the issue?

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

262

1 A. There was extremely limited
2 documentation that had come out of the Cippolone
3 trial, and that is spelled, you will have to help
4 me.
5 But the hemorrhage of documentation was
6 associated with the investigation by the Food and
7 Drug Administration, which brought forth
8 documents, the documents that were sent to the
9 University of California and obtained by
10 Dr. Stanton Glanson and his colleagues in about
11 '94.
12 I don't recall the exact date that those
13 were obtained. And then the litigation in the
14 mid 1990's accelerated the process.
15 So it has basically been a stream of
16 documents going from a trickle to a flood from
17 about 1993 to 1998.
18 Q. And despite that trickle that has turned
19 into a flood, Congress has not chosen to require
20 the placement of a warning label regarding
21 addiction on cigarettes, has it?

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland

1 A. That's correct.

2 Q. How do you believe the placement of a
3 warning label that cigarettes cause addiction on
4 the side of a pack would impact public health?

5 A. If the label had been there when the
6 American Psychiatric Association came to its
7 conclusion in 1980, or when the National
8 Institute on Drug Abuse recommended it in the
9 early 1980s, then in my opinion it would have
10 legitimized third-party payers for providing
11 treatment and would have helped start the
12 development of treatment centers and clinics at
13 that time potentially offered reimbursement.

14 It would have been more important in
15 labeling programs and guidance in educational
16 programs for children, whereby children would
17 have been given more realistic information,
18 instead of what was sometimes done during that
19 time, where they might be taught about addicting
20 drugs in one class and spoken to about cigarettes
21 in another class or maybe even allowed to go out

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

1 into smoking rooms, as was sometimes done in
2 schools during that period.

3 History, I think, would have been very
4 different, had there been a disorder that was
5 more widely recognized and was recognized by
6 government agencies that would have been related
7 to that.

8 Even things like the taxation process
9 would have been different during, after the 1988
10 Surgeon General's Report.

11 It was recommended by, I believe, the
12 Centers for Disease Control, the treatment for
13 dependence be considered tax deductible.

14 The IRS refused in part on the basis of
15 their understanding of tobacco industry
16 testimony, that despite the Surgeon General's
17 conclusions, that the conclusion was not clear
18 and was uncertain. And I know that, because I
19 participated in those discussions.

20 Would having changed the taxation have
21 itself made a big difference in public health? I

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

1 don't think so. That's not what I am testifying.

2 But it is an example of one of the many,
3 many things that would have likely been
4 different, had there been the consensus,
5 legitimized through Congress, legitimized in the
6 labeling, that nicotine in cigarettes was
7 addictive.

8 Q. Is there a consensus today that nicotine
9 in cigarettes is addictive?

10 A. There is a consensus in all major health
11 organizations worldwide. It is difficult to find

12 exceptions.
13 Q. And, in fact, Liggett's products carry
14 an addiction warning label, don't they?
15 A. Yes.
16 Q. And the belief that cigarettes are
17 properly labeled as an addictive product is one
18 that has been widely disseminated within our
19 society, isn't it?
20 A. It has been disseminated and trivialized
21 and opposed. So efforts have been made to
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

266

1 disseminate it by public health officials.
2 And until the tobacco industry
3 executives, I think, realized how ridiculous
4 their statements before Congress looked in 1994,
5 in the light of their own documentation, the
6 industry contested it.
7 And it will be interesting to see in
8 this trial what the industry's position is.
9 The expert that has been drawn upon by
10 the industry denies it to this day, which is just
11 at odds with Philip Morris' web site or seems to
12 be.
13 Q. What expert are you talking about?
14 A. Edward Workman.
15 Q. Would you agree that today at least, the
16 belief that cigarettes are properly described as
17 addicting is widely disseminated within our
18 society?
19 A. It is increasingly widely disseminated,
20 and I don't know the degree to which it is
21 understood or appreciated, since it would be
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

267

1 reasonable for consumers to frankly be confused
2 or wonder what's going on, if cigarettes are
3 labeled for the potential to produce cancer but
4 not addiction. It would help messages, as with
5 marketing, clear unambiguous messages are
6 important.
7 And as recently as 1996, the joint
8 response of the tobacco industry --
9 Q. I'm asking you about today, Doctor, stay
10 with the question.
11 A. Today, as evidenced by one of the
12 experts that you have listed in this case, that
13 we are dealing with today, has said there is no
14 rational basis for the concept of nicotine
15 addiction.
16 Q. Do you believe that affidavit is going
17 to have a large impact on public health?
18 A. I hope not.
19 Q. You think it has been widely
20 disseminated within our society?
21 A. I hope not.
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

1 Q. You think it has been?

2 A. If it is a factor in a ruling, which
3 would seem incredible to me, because it is so out
4 of line with the current state of knowledge, then
5 it would be a factor, it would be a factor in
6 confusing the public about what we really mean by
7 addiction to tobacco.

8 Q. Have you been reading about that
9 affidavit in newspapers or hearing smokers on the
10 street, talking about that affidavit?

11 A. No. And that's not my point.

12 Q. You understand that now at least I hope
13 you understand that there is not any claim for
14 smoking cessation in this lawsuit, don't you?

15 A. Correct.

16 Q. Let's get back to what we were talking
17 about here.

18 Now, is the incidence of youth smoking
19 decreasing currently?

20 A. What?

21 Q. Is the incidence -- is the prevalence of
COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

1 youth smoking going down?

2 A. It is not clear. There are some states
3 like Massachusetts and Florida where it looks
4 pretty clear that progress is being made.

5 Nationwide it looks like there is a
6 possibility that we have a slight downturn
7 nationwide, and I think it is going to be another
8 year or two before we know if that effect is real
9 and if it is persistent.

10 There are some hopeful signs from a
11 public health perspective.

12 Q. You told me earlier that the prevalence
13 of smoking in West Virginia has been stagnating
14 and not changing in a meaningful direction to
15 your knowledge; is that correct?

16 A. From the two sets of data that I have
17 brought in, there had been little change, except
18 a slight increase from 1997 to 1998.

19 And I believe that the overall rates of
20 smoking in West Virginia had declined from the
21 1950's, until the late 1980's, and at some year,

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

1 and I don't recall which year, but I believe
2 between approximately 1985 and 1992, the rates
3 became relatively stable in West Virginia, and I
4 do not believe have shown a major shift since
5 then.

6 I'm not saying there wasn't any change.
7 There is always a little bouncing around from
8 year to year. But if we ran it certainly from
9 the 1960's to the 1980's, there was a period of
10 declining smoking prevalence in many states that
11 ceased for all practical purposes in about the
12 late 1980's.

13 Q. All right. Let's go to the third
14 example you provided, and let me ask you to tell
15 us what your testimony would be with respect to
16 how the cigarette manufacturers have prevented an
17 addiction warning being added to the labeling of
18 cigarettes since release of the Surgeon General's
19 Report of 1988.

20 A. What are you asking me that we haven't
21 already discussed? I discussed their counter

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

271

1 testimony in 1988, I testified myself along with
2 the Attorney General and the head of the Food and
3 Drug Administration in July of 1988.

4 The tobacco industry offered counter
5 testimony that cigarettes were not addicting,
6 that the Surgeon General's Report was wrong, that
7 they did the same thing in January 2nd, 1996.
8 What are you asking that we haven't covered?

9 Q. Well, everything, I believe, because
10 what you and I covered previously was the
11 testimony related to the early 1980s, when NIDA,
12 apparently, attempted that.

13 I'm now asking you about post '88.
14 Identify for me the hearings that were held in
15 1988?

16 A. In July of 1988, there were
17 congressional hearings, and I believe that
18 Congressman Waxman chaired the hearing that I
19 participated in, and primary government witnesses
20 were myself representing the National Institute
21 on Drug Abuse, and that was at the request of the

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

272

1 of the director of the National Institute on Drug
2 Abuse, Dr. Shuster, Dr. Frank Young who was the
3 commissioner of the Food and Drug Administration,
4 and Surgeon General C. Everett Koop. There was
5 other testimony as well, but I believe we were
6 considered the primary witnesses. We testified
7 that cigarettes were addictive, the industry
8 written and verbal testimony, as the record
9 shows, went to great lengths to undermine the
10 credibility of the Surgeon General's Report, the
11 conclusions, to call into question the data.

12 It was a pretty extensive effort that I
13 think was effective in leading some to conclude
14 that the case was not closed despite the Surgeon
15 General's Report.

16 Q. And as I asked you for the prior
17 hearing, how is it that you were able to
18 determine that any particular congressman based
19 his recommendation, as to whether or not a
20 nicotine warning should be added to the label
21 upon the testimony and evidence provided by the

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

273

1 cigarette manufacturing industry?

2 A. I'm not.

3 Q. Tell me about, I think you said the
4 third set of hearings, which were held with
5 respect to whether an addiction warning should be
6 added to the label occurred in 1996; is that
7 correct?

8 A. In 1996, no. 1995 was the issuance by
9 the Food and Drug Administration of the proposed
10 rule to regulate cigarettes and smokeless
11 tobacco. They put the rule up for comment and
12 extended the deadline of comment to, I believe,
13 January 2nd, 1996.

14 At that time, the tobacco industry joint
15 documents strongly opposed the FDA's conclusion
16 that nicotine and cigarettes were addictive.
17 They strongly contested the pharmacological role
18 and one of the subheadings of one of the comments
19 specifically said that nicotine does not have
20 substantial pharmacological effects. Those are
21 statements that --

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

274

1 Q. Those were statements made to the FDA,
2 is that correct?

3 A. Yes. Those were statements made in the
4 written record to the Food and Drug
5 Administration and submitted to the FDA as the
6 official comments and response of the tobacco
7 industry.

8 Q. Those statements certainly did not slow
9 down the FDA, in determining whether or not to
10 regulate cigarettes, did they?

11 A. It certainly slowed it down. It
12 certainly, the opposition by the industry
13 certainly slowed down congressional support.

14 Q. The FDA ultimately chose to regulate
15 cigarettes, in spite of the industry's comments,
16 correct?

17 A. Correct.

18 Q. Because we all know the Fourth Circuit
19 and then United States Supreme Court has found
20 that the FDA does not have jurisdiction to
21 regulate cigarettes?

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

275

1 A. They made a jurisdictional ruling, not a
2 ruling on the science.

3 Q. That was my statement.

4 A. Correct.

5 Q. And so that industry's contesting the
6 scientific issues in front of the FDA did not
7 affect whether or not the FDA chose to regulate
8 cigarettes and ultimately did not affect whether
9 or not the FDA was permitted to regulate
10 cigarettes, did it?

11 A. It was a factor, and anybody that was
12 familiar with the process knows that it was a
13 factor, when the industry came in and said that

14 the science was wrong and flawed, they contested
15 the role of nicotine most strongly.

16 It meant that there was far from the
17 consensus needed for Congress to be able to take
18 the action that it, in my opinion, would have
19 otherwise --

20 Q. Let me back up now. The FDA chose to
21 regulate cigarettes, despite the industry's

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

276

1 scientific submissions that it should not do so,
2 correct?

3 A. Correct.

4 Q. Having chosen to regulate cigarettes,
5 the FDA was reversed by the Federal Court of
6 Appeals and then the Supreme Court, because of a
7 lack of jurisdiction to regulate cigarettes,
8 correct?

9 A. Correct.

10 Q. The reversal of the FDA's decision was
11 not based upon the scientific submissions made by
12 the cigarette manufacturers, correct?

13 A. It would be an over simplification to
14 say that that was not a factor. The tobacco
15 industry, as the record shows, came in with a
16 bulldozer of lawyers fighting every element
17 virtually of the FDA's ruling, and the combined
18 effect was the result that we saw in the court
19 system.

20 Now, for you to say that the science,
21 that their opposition of the science was not a

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

277

1 factor, I don't believe that their opposition was
2 meaningless, even though the Supreme Court ruling
3 focused mainly on the jurisdictional issue.

4 Q. I'm willing to accept it either way. I
5 want you to choose one or the other. Did the
6 Court of Appeals and Supreme Court base its
7 decision upon jurisdictional issues alone or in
8 part did it reverse the FDA because of the
9 scientific issues with respect to whether or not
10 FDA should regulate cigarettes?

11 A. The ruling was focused on the
12 jurisdictional issue.

13 But what I am saying is that the
14 opposition at all of the other levels, I believe,
15 was part of the entire process. I don't think
16 the Supreme Court Justices live in a complete
17 vacuum. It is not possible for me to say that
18 the industry's blocking or attempt to block the
19 science and undermine the science was a factor or
20 was not a factor, but it was an event that the
21 industry did, that is at odds with the

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

278

1 documentation that we now know they had.

2 I don't know how things would have been
3 different, if they had been fully forthcoming.
4 Q. I agree with you completely on that last
5 statement.

6 I need to walk through with you the rest
7 of your disclosure. But before I do that, I want
8 to ask you this, because it is something I want
9 to make sure we cover today.

10 Early on today, you, I thought,
11 indicated that you might have some opinions with
12 respect to how implementation of the medical
13 monitoring program suggested by plaintiffs in
14 this case might affect quitting or cessation of
15 smoking among class members. Did I understand
16 you correctly?

17 A. Yes.

18 Q. Let me ask you first to describe for me
19 what you understand to be the medical monitoring
20 program being recommended by the plaintiff's
21 experts in this case?

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

279

1 A. What I know I can state very simply,
2 because I am not familiar with the details of it.
3 I am familiar enough with it that I have come to
4 the conclusion that it does not include specific
5 smoking cessation treatment and that that is not
6 the intent of the program, but that people that
7 meet the class definition at least of five pack
8 years would undergo regular medical evaluations
9 for a variety of conditions.

10 I'll stop there.

11 Q. Okay. You also, I assume, understand
12 that the regular medical evaluations would only
13 begin once the class members reached certain
14 ages?

15 A. Yes. I assume that. I don't recall the
16 details of the implementation.

17 Q. Well, you can't be blamed for that,
18 because it is a moving target.

19 MR. GRUENLOH: Move to strike.

20 Q. Let me ask you then what your opinions
21 are with respect to how, at least at the level of
COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

280

1 detail you understand it, the plaintiff's medical
2 monitoring recommended regimen would impact
3 cessation rates?

4 A. What it means is that smokers would be
5 more reliably and regularly brought into a
6 medical system that would be attending to
7 smoking-attributable diseases.

8 Why that is relevant is because while
9 other events are happening in the world at the
10 same time, one of them is that health
11 professionals are receiving things like the
12 clinical practice guidelines, which are saying,
13 making very forceful arguments, that health
14 professionals should strongly encourage people to

15 stop smoking and should offer assistance, and
16 that, I believe, this will continue to increase.

17 That is an important dynamic factor in
18 smoking cessation rates.

19 And one of the conclusions, in fact, of
20 the practice guideline, was that there is a
21 public health benefit of simply getting health

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

281

1 professionals to talk more to their patients
2 about the adverse effects of smoking and the
3 benefits of quitting.

4 I believe that this is likely to happen
5 as a part of this medical monitoring, whether or
6 not that is the specific intent of the medical
7 monitoring.

8 Q. Let me try to make sure I understand.
9 The more often a smoker sees their physician and
10 is urged by that physician to stop smoking and/or
11 offered assistance in stopping smoking, the more
12 likely that smoker is to, in fact, stop, correct?

13 A. Correct.

14 Q. That occurs regardless of whether or not
15 the physician in those meetings also conducts
16 certain tests of the patient to determine whether
17 or not they currently have a smoking-related
18 disease, correct?

19 A. It can. However, what is sometimes
20 called the teachable moment or the reachable
21 moment is when a health professional is

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

282

1 specifically talking to a smoker about a
2 smoking-related symptom or disease, that that is
3 a particularly good time to talk about smoking
4 cessation.

5 Now, it is theoretically possible that
6 this would never happen under the medical
7 monitoring situation, but I have a lot more
8 confidence in the integrity of the health
9 professionals in West Virginia, that they would
10 offer such guidance to smokers, even if that is
11 not the specific charge of the medical
12 monitoring.

13 Q. Now, this teachable moment that you are
14 talking about, I take it that that occurs when
15 the individual is told by their physician that
16 they, in fact, are developing a smoking-related
17 illness; is that correct?

18 A. It can, or it can be with a symptom such
19 as coughing or a cold that may not be directly
20 attributable to smoking, but it becomes an
21 opportunity for the physician to point out that

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

283

1 this is something that can be exacerbated by
2 smoking. It makes the reality of smoking

3 toxicity more real at an individual level. This
4 has been understood for quite a few years, so it
5 is not novel.

6 My understanding is that the medical
7 monitoring intent is not to do this, but what I
8 am saying is that I believe that it is likely
9 that if we increase the contact of cigarette
10 smokers with health professionals who are
11 concerned about smoking attributable disease that
12 they will be more likely to get advice and
13 guidance to quit smoking.

14 Q. Are there any empirical data that show
15 that, in fact, individuals who receive medical
16 monitoring for smoking-related diseases are any
17 more likely to stop smoking than individuals that
18 are simply counseled by their physicians to stop
19 smoking?

20 A. There are, is a conclusion by the 1996
21 clinical practice guideline, and again by the
COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

284

1 recent U.S. Public Health Service guideline
2 issued this past June, that guidance has benefits
3 and that the guidance can be demonstrated,
4 whether the person is a physician, in other
5 words, if there are a variety of kinds of health
6 care officials that can have this beneficial
7 effect, what that tells us is that the benefit is
8 not limited to an isolated kind of situation, but
9 it is a generalizable benefit, to the best of our
10 knowledge, and, therefore, I think it is a
11 reasonable inference that in a medical monitoring
12 program pertaining to cigarette smoking, that
13 such guidance will occur.

14 If you are asking me if the guidance
15 will be any better than it would in a general
16 practice setting, I don't know, but the medical
17 monitoring program for smokers is intended to
18 bring smokers more regularly and more reliably
19 into contact with health professionals and that's
20 a good step in the right direction with respect
21 to cessation.

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

285

1 Q. There for a moment you came close to
2 answering my question, so let me try again.

3 I'm not really asking you about
4 reasonable inferences that you might draw. I'm
5 asking you whether there are any empirical data,
6 observational data that shows that individuals
7 who receive medical monitoring for smoking
8 related diseases are any more likely to stop
9 smoking than individuals who are counseled by
10 their physicians to stop smoking?

11 A. I don't know. It would be consistent
12 with the concept of the teachable moment, but I'm
13 not sure if there has been -- you constructed the
14 question very narrowly, and I don't know if the
15 studies, I would have to go back and look at the

16 studies I described in the guideline to see if
17 they would meet the rather narrow definition that
18 you have articulated.

19 Q. I don't know that I am articulating any
20 definition.

21 A. Or just say the way you are asking the
COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

286

1 question, I don't know. I made an attempt to
2 answer it as I understand it and why I believe
3 there is probably benefit and why it is a step in
4 the right direction, but as to a specific
5 empirical study on medical monitoring benefit as
6 opposed to -- I don't know.

7 Q. You read Dr. Benowitz's deposition,
8 right?

9 A. As I told you, I went through it very
10 quickly and didn't spend a lot of time with it.

11 Q. You saw I asked Dr. Benowitz these kinds
12 of questions, didn't you?

13 A. I saw there was some discussion of
14 medical monitoring. I went through this very
15 quickly, because that is not my primary area of
16 expertise, nor the reason that I believe I have
17 been asked to serve in this trial.

18 So I won't even pretend to be intimately
19 familiar with what he said, what the questions
20 were. I would be happy to go back and look at
21 it, if you want to point out things.

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

287

1 Q. If two individuals go to a physician,
2 two smokers go to a physician, and they are both
3 counseled to stop smoking and offered assistance
4 by their physician, but one of them also receives
5 a spirometry test while there, is either one of
6 them more likely to quit than the other, based on
7 that interaction with a physician?

8 A. I don't know.

9 Q. Would it matter whether the spirometry
10 test showed whether smoking was affecting their
11 lung function or not?

12 A. It may, if it creates the possibility of
13 a teachable moment.

14 Q. What kind of moment do you think it
15 creates if the smoker is told that, well, despite
16 your smoking it doesn't appear to be affecting
17 your lung function?

18 A. It is a lost opportunity. I don't know.
19 You are raising hypotheticals. I don't know.

20 THE WITNESS: When you come to a
21 convenient point, could I have about five

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

288

1 minutes?

2 MR. FURR: Sure. You can take it now.
3 (Break.)

4 Q. Dr. Henningfield, I asked you these
5 questions at least tangentially, but let me ask
6 them directly now.

7 Have you ever attempted to review the
8 literature to determine whether or not
9 participation in a medical monitoring program
10 affects quit rates separate and apart from the
11 effect of simply being in the presence of a
12 physician during a participation?

13 A. No.

14 Q. Do you know of any evidence that
15 participating in a medical monitoring program
16 affects quit rates among smokers separate and
17 apart from the effect of simply being in the
18 presence of a physician or other health care
19 provider by virtue of participating in the
20 medical monitoring program?

21 A. Yes. All other things were equal. In
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

289

1 other words, if there were the same regularity
2 and reliability of seeing a health professional
3 and when you walk in the door and one says
4 medical monitor on the door and the other
5 doesn't, I don't know that there would be a
6 difference. The difference is to get in the door
7 at all, that brings you in contact with a health
8 professional, which is what the medical
9 monitoring would do.

10 Q. Is it possible that, as you just
11 described it, all other things being equal, that
12 walking in the door that allows you to
13 participate in the medical monitoring program
14 versus going into the door where you just
15 interact with a physician might actually decrease
16 a smoker's likelihood of quitting?

17 A. It is possible, but I believe
18 improbable.

19 (Whereupon, Henningfield Deposition
20 Exhibit No. 10, article by Badgett, marked.)

21 Q. Dr. Henningfield, let me ask you to take
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

290

1 a look at what we have marked as Henningfield
2 Exhibit 10, which is an article entitled Is
3 Screening for Chronic Pulmonary Obstructive
4 Disease Justified, by Robert Badgett. Do you
5 have that in front of you?

6 A. Yes. I do.

7 Q. That was published in Preventive
8 Medicine, in 1997; correct?

9 A. Yes.

10 Q. That is a peer-reviewed journal, isn't
11 it?

12 A. Yes.

13 Q. Is that a journal that you read on a
14 regular basis?

15 A. I read it when there is an article of
16 interest. It is not a journal that I subscribe

17 to or obtain regularly.
18 Q. Have you ever seen the article that we
19 have marked as Deposition Exhibit 10?
20 A. It looks familiar, but I am not positive
21 that I've had it in my possession.

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

291

1 Q. Did you read the portion of
2 Dr. Benowitz' deposition in which I questioned
3 Dr. Benowitz on this article?
4 A. I don't remember a specific questioning
5 or testimony.
6 Q. Let me ask you to look at the last
7 sentence in the results section of the abstract,
8 I'm sorry.
9 The statement is made that smokers with
10 abnormal spirometric results are less likely than
11 other smokers to quit over the ensuing year. Do
12 you see that?
13 A. Yes.
14 Q. Is that a statement with which you
15 agree?
16 A. Well, I'm not sure what you mean. The
17 sentence is there.
18 Q. Is it a correct sentence, in the sense
19 that do the data support that conclusion?
20 A. I would assume, but I have not verified
21 it for myself that that is a result that was

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

292

1 found in the study.
2 That doesn't mean it explains the
3 results or, even without having read the study,
4 there are any number of explanations for such a
5 result.
6 Q. This is not a study, this is a
7 literature review, correct?
8 A. I haven't read the article. I would be
9 happy to review it.
10 Q. Let me ask you to read the abstract for
11 me now, and I will see what questions you can
12 answer.
13 A. I will read the abstract. I will still
14 be careful on my responses, because the abstract
15 is only that.
16 Okay. I have read the abstract.
17 Q. Okay. This article purports to be a
18 literature review in which they have attempted to
19 address whether or not spirometric screening of
20 asymptomatic smokers affects smoking cessation,
21 correct?

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

293

1 A. Correct.
2 Q. And their conclusion is that smokers
3 with abnormal spirometric results are less likely
4 than other smokers to quit over the ensuing year,

5 correct?
6 A. That is one conclusion listed in the
7 abstract there, even the abstract has other
8 conclusions.
9 Q. I'm only asking but that conclusion now?
10 A. That is, I mean, what you read is in the
11 abstract.
12 Q. And is that consistent with your
13 understanding of what the data show?
14 A. I would have to spend more time looking
15 at this, just looking at the abstract or pointing
16 out that two studies found multi-faceted smoking
17 cessation programs that included spirometry were
18 efficacious.
19 There was no effect in a third study
20 that isolated the role of spirometry. It is not
21 surprising, based on what we know about smoking

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

294

1 cessation, if you just do one specific thing,
2 that it may have no benefit.
3 As to the conclusion that with abnormal
4 spirometric results are less likely than other
5 smokers to quit, you know, I don't know if that
6 is because those smokers are more addicted, which
7 could also be consistent or what the explanation
8 is. And so I won't speculate without looking at
9 the article in greater detail.
10 Q. I want to ask you this question separate
11 and apart from what this article states, and put
12 it to you as an expert in this case.
13 If you don't know the answer, that's
14 fine, you can just tell me you don't know.
15 But do you know whether smokers with
16 abnormal spirometric results are more or less
17 likely than smokers with normal spirometric
18 results to quit over the ensuing year?
19 A. I don't know.
20 Q. This is probably the same question, but
21 let me ask it a slightly different way.

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

295

1 Does informing a smoker of the results
2 of spirometric testing result in either an
3 increase or a decrease in smoking cessation
4 rates, or do you know?
5 A. I don't know.
6 Q. Would informing a smoker of the results
7 of an electrocardiogram test result in either an
8 increased or decreased likelihood of smoking
9 cessation, or do you know?
10 A. It would depend on the results and how
11 the message was conveyed.
12 Q. What results would produce what result?
13 A. Well, it is likely that if a person was
14 shown an abnormal electrocardiogram and told very
15 decisively by his or her doctor that this may be
16 caused by the smoking, and they need to quit
17 smoking, it is more likely that they would make

18 an effort than if they were not given that
19 information.
20 Q. Is that just a matter of common sense to
21 you, or are there empirical data demonstrating
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

296

1 that that, in fact, occurs?
2 A. That's the conclusion of people who have
3 specialized in what I have referred to as the
4 reachable moment, and papers have been published
5 by Nancy Ragotti, R-A-G-O-T-T-I, and others on
6 the importance of the teachable moment, and it is
7 an empirical observation. I don't know how well
8 it has been studied, the difference between the
9 advice, you know, mutually given or the advice in
10 that setting. I don't know.

11 Q. I want you to turn to page 468 of that
12 article. Look at the right-hand column, where it
13 is stated: Unfortunately, our current knowledge
14 of spirometry in motivating smoking cessation is
15 still well described in the 1983 statement by the
16 American Thoracic Society, ATS: "Whether
17 spirometric screening is efficacious in smoking
18 cessation programs compared with other modes of
19 intervention still must be assessed."

20 You see that?

21 A. Yes.
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

297

1 Q. I take it from your previous answer that
2 you would agree that that is still a correct
3 statement today?

4 A. What I will say is that in this article,
5 that is published in 1997, they came to a
6 conclusion which has presumably been peer
7 reviewed.

8 I don't know if there are subsequent
9 studies. I don't find it completely surprising
10 that a single test done in the absence of a
11 multi-faceted program is effective in smoking
12 cessation, so I don't have any basis to question
13 it.

14 Q. Dr. Henningfield, are you familiar with
15 the term rationalization as that term is used to
16 describe the manner in which smokers sometimes
17 process mentally information about smoking and
18 health?

19 A. Yes.

20 Q. Would you explain that term to us?

21 A. The term is sometimes used
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

298

1 interchangeably with optimistic bias, although
2 you can mean different things.

3 But it is related to the notion that the
4 smoker may either believe that they are not as
5 likely as other smokers are to develop a

6 debilitating disease and/or that if damage has
7 been done, that it is too late to do anything
8 and/or why should they worry about smoking if
9 there is, for example, air pollution or food
10 additives in their Oreo Cookies, for example.

11 The term has been used in various ways,
12 but that captures, I think, some of the range.

13 Q. Is this process of rationalization by
14 smokers a factor that affects in at least some
15 people their likelihood of quitting smoking.

16 A. It can.

17 Q. How does it do that?

18 A. If the motivation to quit is reduced by
19 the belief that either the damage is already
20 done, so it is too late and it doesn't make any
21 difference, or that another cause of disease is

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

299

1 at a higher probability, and here the extreme
2 case would be a battle situation in wartime, or
3 that the person is simply, you know, made of
4 steel, sometimes people will talk about
5 themselves that they are not going to be harmed
6 because they are strong and active.

7 Any of these things can undermine
8 motivation to try to quit.

9 Q. So, for example, as was suggested in the
10 last article that we looked at, among smokers who
11 tend to rationalize, there is the possibility
12 that receiving an adverse spirometric test --

13 A. You mean an attribution about the
14 article. Where did the article talk about it?

15 Q. Let me try again. Let me try again for
16 you.

17 The last article we looked at purported
18 to find that smokers who received abnormal
19 spirometric tests may be less likely than other
20 smokers to quit smoking within the ensuing year,
21 correct?

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

300

1 A. Okay. We are talking about Badgett and
2 Tanaka, and you are taking the statement out of
3 the abstract.

4 Q. Correct.

5 A. Okay.

6 Q. Am I correct that that is what they
7 purportedly found?

8 A. I'm with you so far. I just haven't
9 figured out the rationalization connection yet.

10 Q. One explanation for those findings could
11 be the form of rationalization you just
12 described, whereby some smokers might conclude
13 that the damage is already done, there is no
14 reason to quit now, correct?

15 A. Are you offering that on the basis of
16 your expertise, or asking me to speculate, or is
17 there something in the article about that? You
18 are making a huge leap.

19 Q. Just answer the question. Is that a
20 possibility for the explanation for the results?

21 A. I haven't even read this article. I
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

301

1 don't have a clue.

2 Q. I want you to assume that those results
3 are accurately reported, for purposes of the
4 question.

5 A. You know, you are asking me to make
6 something up. I haven't even read the article.
7 I don't know what all kinds of information they
8 collected.

9 Q. Okay. Let's start again, because I
10 don't -- I certainly wouldn't want you to
11 speculate here today.

12 I want you to assume that Badgett
13 correctly or accurately reported that the data
14 show that smokers with abnormal spirometric
15 results are less likely than other smokers to
16 quit within the following year. You understand?
17 Assume that's correct.

18 A. Okay.

19 Q. If that's correct, I am asking you
20 whether a possible explanation for that is the
21 type of rationalization that you just explained

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

302

1 to us, whereby some smokers learn that they have
2 developed a disease process but continue smoking
3 anyway under the notion that the damage has
4 already been done?

5 A. You are asking me is that possible?

6 Q. That is a possible explanation for at
7 least some of those findings?

8 A. That's one possible explanation among
9 many possible explanations.

10 Q. Now, you also explained to us a form of
11 rationalization whereby some smokers tend to
12 believe that they are more resistant to or less
13 likely to develop disease from smoking than other
14 people, correct?

15 A. Yes.

16 Q. And if a smoker undergoes a screening
17 test and learns that, in fact, they have not
18 developed any smoking-related disease, does that
19 increase the possibility that some of those types
20 of smokers might engage in the type of
21 rationalization whereby they perceive that to be

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

303

1 evidence that they are less likely to be injured
2 by smoking than others and, therefore, find less
3 of a need to stop smoking?

4 A. You are raising hypotheticals to which
5 anything is possible. I think the important, an
6 important consideration is what people are told

7 at the time --
8 Q. I'm not asking you what you think is
9 important about what they are told, because --
10 and I would submit to you that my hypothetical is
11 not absurd, unless you think that Dr. Badgett
12 likes to raise absurd hypotheticals. I want you
13 to look at page 470 of the Badgett article.

14 A. Let me make a correction for the record,
15 so you don't put words in my mouth. I didn't say
16 your hypothetical was absurd, I don't recall the
17 exact words, but I didn't say that. I said that
18 is a possibility.

19 Q. Let me ask you to turn to page 470 of
20 Badgett. In the second full paragraph, beginning
21 with "we recommend", third sentence beginning
COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

304

1 with "if", the following statement appears:
2 If the physician believes that normal
3 spirometric results may falsely reassure a smoker
4 that continued smoking will not be harmful, then
5 the physician may further reserve spirometry for
6 the refractory smoker who is motivated and has
7 clinical findings of COPD.

8 You see that?

9 A. Yes.

10 Q. Are there some smokers that may be
11 falsely reassured by normal spirometric results
12 and thus continue smoking?

13 A. It is possible, and I think this kind of
14 information will be important in any medical
15 monitoring program that is set up to maximize the
16 benefit and minimize the unintended consequences.

17 Q. Now, there is another term that I have
18 seen you use in the past, to describe one aspect
19 of thought process, of the thought processes that
20 some smokers go through with respect to making
21 decisions about smoking, and that is denial.

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

305

1 Correct?

2 A. Correct.

3 Q. Would you define denial for us?

4 A. Denial is, can be similar to what I have
5 just been discussing under the framework of
6 rationalization, where people can use the term in
7 different ways.

8 But the classic instance is somebody
9 saying that, telling others that the damage will
10 not occur to them, or that if they are sick, for
11 example, it is because of another reason, not
12 related to smoking, even if there is evidence
13 that smoking is important, classic denial in
14 addictions are people that will say I can quit,
15 but I just don't want to now.

16 There are many forms. There isn't, when
17 I have used the term, you know, I'm not sure of
18 the real precision that I have used the term. I
19 have used the term over the years and the

20 addiction literature in general uses the term, in
21 ways such as I have just described.

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

306

1 Q. Let's see if we can close this out and
2 make sure I understand what opinions you are or
3 are not prepared to offer.

4 Separate and apart from the effect on
5 smoking cessation that occurs by virtue of
6 interaction with physicians and other health
7 personnel, you are not prepared today to offer
8 any opinions on how participation in the medical
9 monitoring program offered by plaintiffs in this
10 case will affect smoking cessation rates; is that
11 correct?

12 A. What I have stated is that I think it is
13 a step in the direction of bringing the smokers
14 more regularly and more reliably into a health
15 care setting with people that will presumably
16 have some familiarity with smoking-attributable
17 disease and will be likely to advise people to
18 quit and to perhaps offer aid, even though I
19 understand that advising and aiding is not the,
20 to the best of my knowledge, the intent of the
21 medical monitoring.

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

307

1 All I am saying is that I think that
2 that is a probable consequence or a possible
3 consequence, and if this goes forward I would
4 strongly advise that that is a consequence.

5 And since the U.S. Public Health Service
6 has just offered, issued another practice
7 guideline, I think it would be highly likely that
8 that would be a consequence.

9 Q. And so the answer to my question is yes?

10 A. The answer to your question is what I
11 just told you.

12 Q. Here is what I want to understand,
13 because you and I will probably have some chances
14 to talk about these things in the future. As I
15 listen to your answer and look at it on the
16 screen, I don't see you doing anything but
17 restating what I said.

18 So I don't understand why you didn't
19 just say yes. What I would like you to explain
20 to me is what I left out of my question or what
21 was missing or misleading about my summary of

COURT REPORTING CONCEPTS, INC.

Baltimore, Maryland

Phone (410) 821-4888 Fax (410) 821-4889

308

1 your testimony that you just couldn't say yes to?

2 A. I don't recall. There must have been
3 something I didn't like about the way you put it.

4 MR. FURR: Well, it is 5:15, and as I
5 understand it, we do have an agreement to proceed
6 until 5:30 today. We will proceed just a few
7 more minutes and then stop.

8 I want to make clear though so that we
9 can get out of here on time, and Mr. Gruenloh and
10 I have discussed this, that we are going to seek
11 an additional opportunity to have another day to
12 further depose you, both on the documents that we
13 have discussed with you today and on substantive
14 issues that I was unable to reach today.

15 Q. Let me ask you first, Dr. Henningfield
16 do you have any objection to providing us an
17 additional day sometime in September?

18 A. It will be difficult for me to pull
19 together things or it may be difficult to pull
20 together things, depending on when in September
21 you need it.

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

309

1 I have an extremely intense September
2 schedule. As I stated earlier, this litigation
3 activity is a small percentage of my overall
4 activities, and I have a lot of other
5 responsibilities.

6 So, yes, I have a general objection. It
7 will be difficult. I'm not saying it will be
8 impossible.

9 Q. Assuming your schedule permits it, do
10 you have any other objections to providing us
11 with an additional day?

12 A. If my schedule permits it, if it is
13 possible, it is possible. I don't object in
14 principle. It is just the practical reality that
15 I have other professional responsibilities.

16 MR. WOOLSON: Let me put on the record
17 that Liggett does want to ask just a few
18 questions at some point, and we anticipated it
19 would be at the end of the other defendants'
20 questioning. So if there is a continuation,
21 that's when we would like to do it.

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

310

1 MR. NEWBOLD: On behalf of Lorillard, I
2 would like to state that we too have questions to
3 ask on substantive issues that have not yet been
4 asked in this deposition.

5 We also restate our prior statement
6 pertaining to the documents, and ask that we have
7 an opportunity to be shown the documents which
8 pertain specifically to Lorillard and to be given
9 the opportunity to ask questions on those
10 documents.

11 We will need additional time to do those
12 two things.

13 MR. GRUENLOH: Before we go on, I'll
14 tell you what I told Jeff before. As we sit here
15 today, I'm not going to agree to provide an extra
16 day. I told Jeff that I would be willing to go
17 back and talk to my co-counsel and discuss it
18 with them, just so you know.

19 MS. HILL: This is Gabrielle Hill, on
20 behalf of Brown & Williamson, I too reserve the

21 right to ask further questions, sir.
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889
311

1 MR. WOOLSON: I'll say it is 5:20, and I
2 would suggest all of you are trying to get to
3 airports and trains, you probably should go.
4 MR. FURR: Based upon that local
5 knowledge, I think we will adjourn for today.
6 MR. GRUENLOH: I have two or three
7 questions.
8 MR. FURR: If we are going to continue,
9 I will continue.
10 MR. GRUENLOH: I have five minutes.
11 MR. FURR: I don't think it is proper to
12 do that if we are going in order.
13 MR. GRUENLOH: I didn't say we were
14 going in order. I said I would talk to my
15 co-counsel.
16 MR. FURR: That's not the point. I mean
17 as long as we continue while we're here today, I
18 will continue asking the questions or pass it to
19 the other defense counsel, who are entitled to
20 ask questions before you get to today, Mike.
21 So we can either adjourn now, or else I
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889
312

1 will keep going up until 5:30. What I am not
2 going to do is agree that you can go out of order
3 and ask your questions today. I don't think
4 that's appropriate.
5 MR. GRUENLOH: We've agreed to go to
6 5:30. If that's the position you will take, I
7 will say the defendants can go to 5:30 and then
8 at 5:30 I will ask my questions.
9 MR. FURR: No. We'll be done for the
10 day at 5:30. We agreed we'd be done for the day
11 at 5:30. We are done, and you can sit in here
12 and ask questions of the doctor if you want to,
13 but it will be over our objection and we'll all
14 be gone, because that's when we agreed we would
15 be stopping today.
16 We are not going to play some game where
17 you get the last few minutes of the day to ask
18 questions that you want to ask to prevent your
19 need from coming back for another day. I will
20 not agree to that. You want me to go forward, or
21 do you want to stop now?
COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889
313

1 MR. GRUENLOH: You told me you are not
2 going to allow me or stay in the room if I ask
3 questions even if you do continue. So I guess we
4 will stop. But it is clear to me this is a game
5 you are playing.
6 MR. FURR: Okay, we'll stop now.
7 (Examination suspended -- 5:31 p.m.)
8 -----

9
10
11
12
13
14
15
16
17
18
19
20
21

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

314

1 STATE OF MARYLAND SS:
2 I, E. D. SMITH, RPR-CRR, a Notary Public of
3 the State of Maryland, do hereby certify that the
4 within named, personally appeared before me at
5 the time and place herein set out, and after
6 having been duly sworn by me, was interrogated by
7 counsel.
8 I further certify that the examination was
9 recorded stenographically by me and this
10 transcript is a true record of the proceedings.
11 I further certify that the stipulations
12 contained herein were entered into by counsel in
13 my presence.
14 I further certify that I am not of counsel
15 to any of the parties, nor an employee of
16 counsel, nor related to any of the parties nor in
17 any way interested in the outcome of this action.
18 As witness my hand and notarial seal this
19 31st Day of August, 2000.
20 My commission expires
21 November 1, 2002

Notary Public

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

315

1	INDEX OF EXAMINATION	
2	BY MR. FURR:	7
3		
4	INDEX OF EXHIBITS	
5		
6	Deposition Exhibit No. 1, notice.....	8
7	Deposition Exhibit No. 2, CV.....	10
8	Deposition Exhibit No. 3, MMWR Weekly report....	
9	11
10	Deposition Exhibit No. 4, MMWR weekly report	
11	dated 11/19/99.....	12
12	Deposition Exhibit No. 5, Wilson affidavit...	71
13	Deposition Exhibit No. 6, Workman affidavit..	71
14	Deposition Exhibit No. 7, expert disclosure.....	
15	130
16	Deposition Exhibit No. 8, schedule of documents	
17	166
18	Deposition Exhibit No. 9, excerpt from 1964	
19	Surgeon General's Report.....	231
20	Deposition Exhibit No. 10, article by Badgett...	
21	289

COURT REPORTING CONCEPTS, INC.
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889